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JULY, 1848.

TRIAL FOR MURDER IN FRANCE.—LOLA MONTES.

On the 26th March, 1846, an interesting trial took place at Rouen, in which Bouvallon, one of the editors of a paper published in Paris, called "The Globe," was charged with the murder of Dujarier, the editor in chief of "*La Presse*," a well known and highly influential paper published in the same city. Although the alleged murder took place at Paris, circumstances rendered it necessary to remove the trial to Rouen. The defence was, that the deceased was killed by the accused in a duel, according to the rules of honor regulating such combats. It was gravely objected, on the part of the prosecution, that the defendant was not entitled to avail himself of these laws, because, at one period of his life, he had been guilty of *stealing a watch!* The larceny of the watch was clearly proved on the trial to have been committed in January, 1840; and the accused, being interrogated on the subject, so far from denying it, said "I committed a fault of youth, and cruelly have I expiated it." To an inquiry as to what

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bearing the introduction of such evidence could possibly have on the case, a distinguished lawyer answered that "a French jury would only tolerate duels among men of honor, and a man would forfeit his privilege to commit *murder* if it was believed he had ever been a *thief*." Connected with this *criminal* accusation was a *civil* suit for damages, by the mother and nephews of the deceased.—By the French law if a man wounds or kills another, he is liable to pay the wounded person, if he lives, or his next of kin, if he dies, damages for the civil injury done them. The criminal charge is submitted to a jury, of whom seven may return a verdict. The civil action, both as to law and fact, is decided at the same time by the court, without the intervention of a jury. The witnesses are not selected by one party and the other, because their testimony may be favorable to any particular view of the case, but for the purpose of obtaining all the information that can be had; and hence it is that the judge, and not the counsel, proceeds to interrogate them with the sole design of establishing the truth. Forty-six witnesses were examined. The first was Alexander Dumas, the celebrated and popular writer of the day. Being asked, in the usual form, what his profession was, he answered "I should call myself a dramatic poet, if I was not in the birth place of Corneille." This answer touched the hearts of the audience, for Rouen was the birth place of the two brothers Pierre and Thomas Cornielle, and, although more than two hundred years have elapsed since their birth, their memory is still honored by the inhabitants.—Dumas was the common friend of both the parties engaged in the duel, and, being informed that the weapons selected were pistols, and knowing how unskillful Dujarier was, sent his son with him to a shooting gallery, where he was able to *hit a mark as large as a man only twice in fourteen times!* But the testimony of Dumas went strongly

to the *respectability of the parties as men of honor* ! The duel grew out of something which occurred at a dinner party given in one of the most celebrated establishments at the Palais Royal, at an expense of 55 francs (\$11 00) per head !

The President, on the trial, instructed the jury that to kill a man in a duel is murder by the law of France ; that the fact of killing being proved by the voluntary discharge of a loaded pistol, the defendant was chargeable with the offence imputed to him ; but that the jury had a right to declare that it was done under alleviating circumstances, &c. After ten minutes absence, the jury returned their verdict in the following form : The foreman rising, and being asked, "Is the accusation true?" answered, "upon my honor and my conscience, before God and man, the declaration of the jury is, No. The accused is not guilty."

The arguments then commenced in relation to the civil suit for damages, which was tried by the court alone without a jury, and the difference in the result shows what is very common in this country in the trial of criminal cases, a wide difference of opinion between the court and jury. In the criminal prosecution the accused, we have seen, was acquitted by the jury ; but in the civil suit the court awarded to the widow-mother, and the nephews of the deceased, the sum of 20,000 francs (\$4000) damages, with costs, and ordered that Bouvallon, in case of default in payment, should be imprisoned two years.

We have already brought to the notice of the reader one celebrated witness, Mr. Alexandre Dumas. But another witness was examined who has since gained an equal celebrity, although of a character somewhat different. LOLA MONTES was examined as a witness. She was an artiste of the Theatre Port St. Martin, a Spaniard, who spoke French imperfectly, and her connexion with the

deceased may be ascertained from the following letter, which he wrote to her on the morning of the duel.

"My dear Lola. I am going out to fight with pistols. This explains why I have slept alone, and why I do not come to see you this morning. I have need of all my calmness. At two o'clock all will be over. A thousand embraces, my dear Lola, my good little wife, whom I love so much, and the thoughts of whom will never leave me."

Mlle. De Montes in her testimony spoke highly of the kind and amiable qualities of the deceased. She had expressed a desire to be introduced to Bouvallon and to go to the dinner, but Dujarier positively refused to allow it. She received the letter, on her return from rehearsal, and immediately took measures to prevent the duel, but it was too late. "I WAS," said she, in her testimony, "A BETTER SHOT THAN DUJARIER, AND IF BOUVALLON WANTED SATISFACTION I WOULD HAVE FOUGHT HIM MYSELF." She received the corpse from the carriage, and *the emotion which she then experienced was still visible in her testimony.* Dujarier evidently entertained a warm affection for her, as in addition to his farewell letter, he wrote a will, on the morning of the duel, leaving her the principal part of his estate. His interest in "*La Presse*" alone was an item of considerable importance. It was owned by a joint stock company and was divided into 25 shares, each share selling, at the time of the duel, at \$60,000 francs, (\$12,000,) and each share receiving an annual dividend of \$1478. Dujarier, by his ability as a writer, had raised the establishment to this value, and in addition to his salary as chief editor owned eight shares, valued in the aggregate at \$96,000.

The duel was fought in March 1845, in the Bois de Bologne. Bauvallon was the challenger, and, at the first fire, shot his antagonist in the head and killed him instantly. The trial, as already stated, took place on the 26th March, 1846; and Lola Montes, after receiving the corpse from the carriage, superintending the funeral, and making the necessary disposition of her interests under the will

of the deceased, left Paris to forget the scenes and the circumstances connected with the sudden and violent death of her best and only friend. The trial itself possesses an interest with our professional readers for the light which it throws on French jurisprudence. But recent political events in Bavaria have created an increased interest in the case for the view which it presents of the true character of the extraordinary female who has since wielded the destinies of that Kingdom.

The conflagration of Rome is remembered as fixing perpetual infamy upon the name of Nero, while the munificent rebuilding of the city by the same Emperor is almost forgotten. It was the fate of Machiavelli, by the authorship of a single work, to fix a stigma on his reputation which has outlived all the great achievements of a long life of usefulness. The story of the boy who drove a nail in the wall every time he committed an evil deed, and drew one out when he performed a good one, is constantly illustrated in life. The good deeds may be more numerous than the bad ones, and the good that men do may far outweigh, in temporal importance, the evil of their lives; still, so contaminating is the nature of crime, that its marks of shame remain, like the black holes in the wall after the nails had been drawn, to maculate the reputation which had else been spotless. Thus with Lola Montes, she possesses some traits of character, and has performed some acts which would command our admiration at once were it not for the cloud which a grievous sin has thrown upon her character. But let justice be done even to her. The truth can work no injury to any one.

After leaving Paris, she made her next appearance upon the Theatre at Munich. Her association with the literary and political circle in which Dujarier moved in Paris, had made her familiar with general literature, and with European politics in particular. The beauty and rare powers

of mind which won the attachment of her talented protector in Paris made a rapid conquest of the King of Bavaria. The masculine energy and courage which prompted the effort to save the life of her friend by hastening to the duelling ground, with the intention to stand in his place in the deadly conflict, enabled her to acquire an ascendancy over the minds of others. The extent of her influence in Bavaria is shown by her success in driving the Jesuits from power, remodeling the cabinet of the King, and directing all the important measures of his administration.

Leaving her improper relations with that sovereign to the just judgment of an enlightened public, and passing by her elevation to the rank of Countess of Landsfelt, as a circumstance not calculated to disturb the equanimity of plain republicans who place but little value upon patents of nobility, it is due to the cause of justice that a fair record be made of the public acts of these parties, so far as those acts have had an influence upon the kingdom under their control. Where there is so much for morality to condemn it is difficult to see ought to commend.

The King of Bavaria, with all his faults, is something of a poet—has a taste for the fine arts—is a great advocate for internal improvement—and has done a great deal for the cause of religion and of human liberty. Among the Churches built by the King are the St. Ludwig's Church—the Aller Heiligen Chapel, the Theatiner Church, and the Au Church. Among the public buildings built by him are the new palace,—the Glyptothek with all its statues—the Pinacothek, with its statues,—the Odeon,—the Public Library,—the University,—the Clerical School, the School for the female children of the Nobility,—the Feldherrenhalle, filled with statues,—the stained glass manufactory—the Arch of Triumph,—the Ruhmeshalle,—the Bazaar, the new Palace and the Walhalla. Nearly all of these magnificent structures have been erected and the

statuary which many of them contain paid for with the King's own money.

The canal which unites the Maine with the Danube, and thus creates an uninterrupted line of water communication from Rotherdam to the Black Sea, it is said, owes its origin to the King of Bavaria. His friends also claim for him the merit of having first conceived the idea of the Zollverein, which is usually attributed to the King of Prussia. He was the prime mover of the plan for the national rail-ways of Bavaria, and took a most active part in originating the company for running steam boats from the highest navigable point of the Danube above Donauwerth, down to Regensburg. He also introduced, for the benefit of his people, the *Landrathe* system, under which the actual cultivator of the soil is protected in his independence and is no longer the trembling slave of despotism. Under this system he may obtain from the state, on fair and moderate terms, the money necessary to improve the land and carry on his farming operations to advantage. It is true, he must pay an annual rent for the land; but his condition as tenant is accompanied with the privilege of becoming the absolute owner of the fee-simple by the payment of a certain number of years' rent in advance.—A few years' labor enables the tenant to become the owner.

The King came to the throne filled with the most liberal ideas. He was about to admit his people to a very large share of political freedom, but he became suddenly alarmed by the revolutionary movements of 1830 and took to his counsels the Jesuits. Whether from the dictates of his own altered mind, or through the influence of those counsellors, it is not our purpose to enquire, but it is alleged that his government degenerated into a low, petty tyranny, under priestly influences, accompanied with a rigid censorship of the press; and it became intolerable to all but the favored few.

In this stage of Bavarian affairs Lola Montes made her appearance. She obtained permission to dance upon the theatre at Munich. Her beauty and distinguished manners attracted the notice of the King. On further acquaintance with her, he became enamored of her originality of character, her mental powers, and of those bold and novel political views which she fearlessly and frankly laid before him. Under her counsels, a total revolution soon after took place in the Bavarian system of government. The existing ministry were dismissed; new and more liberal advisers were chosen; the power of the Jesuits was ended; Austrian influences repelled, and a foundation laid for making Bavaria an independent member of the great family of nations. These favorable results may fairly be attributed to the talents, the energy and the influence of Lola Montes, who received, in her promotion to the nobility, only the usual reward of political services. She became Countess of Landsfelt, accompanied by an estate of the same name, with certain feudal privileges and rights over some two thousand souls. Her income, including a recent addition from the King of 20,000 florins per annum, is 70,000 florins, or little more than £5000 per annum.—In addition to which she has private property of her own in the English or French funds, a great portion of which it is said consists of shares in the Palais Royal at Paris, left her by Dujarier in his will.

It is alleged that relations other than political exist between this extraordinary female and the King of Bavaria. The fact is too notorious to be denied; and the conduct of the parties in this respect must receive the condemnation of every friend to morality. The King is a married man, and nevertheless has improperly permitted himself to become passionately attached to the Countess of Landsfelt. This attachment enabled her to work out the great political changes which have taken place in Bavaria; and

it is but just to acknowledge that it is the political use she has made of her relations with the king, and not the immorality of that connexion itself, that has brought down upon her most of the vehement censures which the defeated party have bestowed, from time to time, accompanied by the bitterest calumnies. The moral indignation which her political opponents displayed was unfortunately a mere sham. They had not only *tolerated*, but *PATRONIZED* a female who formerly held the equivocal position which the Countess of Landsfelt recently held, because the former made herself subservient to the then dominant party. Give even the evil one his due. Let even Lola Montes have credit for her talents, her intelligence, and her support of popular rights. As a political character she held, until her retirement to Switzerland, an important position in Bavaria, besides having agents and correspondents in various courts of Europe. On foreign politics she has clear ideas and has been treated by the political men of the country as a *substantive* power. She always kept state secrets, and could be consulted with safety, in cases in which her original habits of thought rendered her of service. Acting under her advice, the King had pledged himself to a course of steady improvement in the political freedom of the people. Although she wielded so much power, it is alleged that she never used it either for the promotion of unworthy persons, or, as other favorites have done, for corrupt purposes; and there is reason to believe that political feeling influenced her course, not sordid considerations.

For the foregoing facts in relation to the public merits of the King of Bavaria and the new Countess of Landsfelt we are indebted to an article in Frazer's Magazine.— And we refer the professional reader to the Law Reporter of August 1846, for a more extended account of the trial of Bouvallon.

THE CARLISLE SLAVE RIOT.

The final decision of this painfully exciting case, by the Supreme Court of Pennsylvania, will be found in the present number of the Journal. A deep interest is felt in it throughout the union, on account of its connexion with the question of recaption of fugitive slaves, with the reputation of a distinguished Professor in a highly estimated college, and with the melancholy fate of a citizen of a neighboring state, who appears to have been deprived of his life whilst engaged in the assertion of a right of property recognized by the paramount law of the land. It will be perceived that the decision of the Supreme Court does not touch any of the questions agitated in the court below, except that which relates to the punishment to be inflicted for the offence, according to the existing law of the state. We rejoice to see that the Supreme Court, in reversing the judgment of the court below, for an error in this particular, assigned a reason for the discharge of the prisoners which implies a very proper assertion of authority to "minister justice," and not only to "reverse or affirm" the judgment of the court below, but to "correct all errors" and to "modify" the sentence according to law, in cases where the conviction is regular, and the error is only in the sentence.

It has been jocularly said of a distinguished Senator that "when he takes snuff, all South Carolina sneezes." This remark is, to some extent, expressive of the potent influence which a mere *dictum* of Sir Edward Coke still has not only in England but in some parts of this country. We would not detract from his great merits as a jurist, but it must be conceded that his mind was only great in comparison with the lights of the age in which he lived; and no one would be more astonished than himself, if he were now living, to see some of his hasty expressions at-

tempted to be enforced as the settled and immutable doctrines of the common law. In 3 Inst. 210, Sir Edward remarked, in speaking of a writ of Error, that "if the *judgment* be erroneous, both *that* and the *execution*, and *all former proceedings* shall be reversed by writ of Error."—And this remark is copied by Hawkins and by other writers. —2 Hawk b. 2 c. 20 s. 19. So far from any decision being cited by either Coke or Hawkins in support of reversing "all *former proceedings*" for error in a matter subsequent, the supposed founder of the doctrine rests it entirely upon the derivation of the word *judicium* from the words *a jure* and *dicto*. How this derivation goes to support Sir Edward's position, as recently understood and applied, we are at a loss to perceive. On the contrary, the very reasons given by that great jurist, as they do not tend, in the slightest degree, to sustain such a position, show that Lord Coke never meant to assert any thing so at variance with the right reason of the Common Law; and the rule, on the reversal of an outlawry, after conviction of treason or felony, is directly the other way. 4 Bl. 392, 2 Hale 209, 1 Chit. C. L. 369.

In 1823, in the case of *Rex v. Kenworthy* 1 B. & C. 711, in a case where the court below had *ordered* the prisoner to be transported, omitting the formal words "it is considered," and also omitting the other punishment required by law, the court of error awarded a *procedendo* to the court below, and refused to discharge the prisoner on *Habeas Corpus*. Abbott, C. J. on that occasion remarked that "there is no doubt that at common law, where the punishment is not discretionary, the record of an inferior court may be removed into this court, and *we may pronounce judgment.*" But in 1826, in *Rex v. Ellis* 5 B. & C. 395, and in 1838, in *Rex v. Bourne* 7 Ad. & Ellis 58, it was held, on the authority of Sir Edward Coke's remark, that upon the reversal of a judgment for error in the sentence, as

“where the sentence was transportation and the punishment was *only* death,” the court of Error had no power either to pronounce the proper sentence or to remit the record to the court below for the purpose; but the prisoner must be discharged, although the indictment was valid and the trial and conviction strictly according to justice and law. Such a doctrine, one would think, could only have place where the criminal code was so sanguinary that the humanity of the Judges forced them to take shelter under the great name of Coke for the purpose of saving the prisoner’s life. Fortunately for Pennsylvania, the act against citing British decisions, pronounced since the 4th July 1776, protected this state from the controlling authority of this precedent, and our courts, although they frequently in such cases reversed the judgments of the inferior courts, without making any further order, sometimes remitted the record to the court below with orders to proceed on the indictment, as in *Comth. v. M’ Kisson* 8 S. & R. 422 and *Comth. v. Church*, 1 Barr 110; and at other times ordered the Prisoner to give security for his appearance before the court below to answer any charge that might be brought against him, as in *White v. Comth.* 1 S. & R. 139, and in *Scott v. Comth.* 6 S. & R. 227. In *Comth. v. Dunn*, *Lewis’ Cr. Law* 689, as well as in the case of *Clellands, et al. v. Comth.* just decided, the prisoners, although discharged, were not let loose on society upon the monstrous principle that a court, created for the correction of errors, had a right to commit wrongs far more pernicious than those it assumed to correct. The prisoners, in the cases last referred to, were discharged because they had already, in the opinion of the Supreme Court, been sufficiently punished, under the erroneous sentence of the court below. This clearly implies that if they had not been thus punished the court of Error would have taken the proper measures to “minister justice” in the premises.

The doctrine that an error in a sentence vitiates all the previous proceedings in a cause, and that a criminal, legally convicted upon a valid indictment, is thereby to escape the just punishment due to his crimes, belongs not to the beautiful perfection of the Common Law. It may sometimes be the unfortunate result of defective legislation, in creating special jurisdictions, with authority to proceed in a manner different from the course of the Common Law, but it never can be the case under the sanction of that great compilation of wisdom which has been aptly denominated the perfection of human reason. Hasty expressions, limited comprehension, defective discrimination, and other unfavorable mental conditions of its ministers will sometimes muddy the beautiful stream as it flows down the channel. But through its own recuperative energies the sediment soon finds its gravitating affinities at the bottom and the current flows on in its purity. The ideas that a court of Error could not award a *venire de novo*, nor render such judgment as the court below ought to have rendered, if the defendant below happened to be plaintiff in error, are no longer entertained by enlightened tribunals. Judicial emancipation, in these particulars, at least so far as respects civil suits, has taken place in England, 12 East 608, 3 Bac. Abr. 389, 6 Com. Dig. 464 Title Pleader, 3 B. 20; in Pennsylvania, 2 Rawle 56, 6 Watts 513; in New York, 11 John. 141, 4 Wend. 95; in Massachusetts, 6 Mass. 445, 11 ib. 462; in New Jersey, 1 Harrison 66; in Ohio, 5 Ohio 259; in Mississippi, 3 Howard 104, 2 S. & M. 601; in Illinois, 1 Scam. 405, 417, 511; and, we trust, throughout the United States, 1 Mason 57. The cobwebs of antiquated folly should not be permitted to hold the ministers of the criminal law in bondage, at the expense of sound reason and public justice. The true doctrine on this question, as applied to criminal cases, was declared by Chancellor Walworth, in the court of Errors of New York, and

not denied by any one: "If the judgment is reversed" (on the ground of an error in the sentence) "we must still go on and sentence the plaintiff in error." *Kane v. The People* 8 Wend. 211.

In this State, the act of 16 June, 1836, has placed the civil and criminal justice of the country upon an equal footing in this particular. Its injunctions to the Supreme Court to "minister justice," to "correct all and all manner of errors," and, where the case requires it, to "reverse, affirm or *modify*" the judgments of the courts below, are declaratory of the common law, and leave no pretext for the introduction of a principle which sets at large the legally convicted criminal, and mocks at justice in her most venerated temples. "The principle is well settled," says Mr. Justice Jackson, in delivering the opinion of the Supreme Judicial Court of Massachusetts, in the *Com'th. v. Ellis*: "If the judgment complained of was rendered "by a Court *proceeding according to the course of the common law*, a writ of error lies, on which, in case of reversal, "this Court is authorised to render the same judgment as "the Court below ought to have rendered." 11 Mass. 465. But a principle which was deemed "well settled" in that state in 1814 seems to have been entirely subverted in 1841, under the influence of the English decisions in *Rex v. Ellis* and *Rex v. Bourne*; and a man legally convicted of several larcenies, was permitted to escape without any punishment whatever, upon the ground that the court of Error could neither pronounce the proper judgment itself nor remit the record to the court below for that purpose. *Sheperd v. Com.* 2 Met. 419. It is to be regretted that a tribunal so deservedly respected for its learning should have arrived at a conclusion so greatly at variance with reason, justice, and its own previously well settled views of the common law.

English Decisions.

The Queen v. Michael Stokes.—The prisoner was convicted of murder, before Mr. Baron Rolfe at the late Yorkshire Assizes in England. The indictment alleged that the prisoner "shot, discharged, and sent forth" a certain musket, and thereby caused the death of the deceased. It was objected that the indictment must be taken to mean that the musket itself was sent forth as a missile. The point was reserved for the fifteen judges of England, who took time to consider, and on the 1st May 1848 intimated to the prisoner's counsel that the indictment was valid, and that the words "sent forth" must be rejected as surplusage.

The Queen v. Dunn.—The defendant having been convicted of perjury, at the trial before Lord Denman, Ch. J. at the London Sittings, moved the Common Pleas for a Habeas Corpus on the ground of illegality in the sentence. Wild, Ch. J. on the 24th Nov. 1847 delivered the opinion of the court that the remedy open to the defendant, if he has a right to impeach the judgment, is by writ of error, and if this court were to grant this application, it would lead to the conclusion that the judgment of every court might be set aside on a writ of Habeas Corpus." Motion refused. Vide London Jurist Feb. 12 1848, p. 99.

Smith v. Fox.—Bill for discovery. Upon the face of the bill it appeared that the plaintiff had employed Fox, a Solicitor, to give a notice to Cadwallader a mortgagor, required to be given by the terms of the mortgage previous to its foreclosure by the plaintiff the mortgagee. A notice was given on 29 June, 1829, and the mortgage foreclosed. But in January 1841, it was determined that the notice was defective and that the mortgagor had a right to re-

deem, decreeing an account. In March, 1844, the sum was ascertained, and the plaintiff paid the amount shortly afterwards. The plaintiff in Nov. 1846 brought an action on the case against Fox, the solicitor, for negligence in giving the notice. Fox demurred to the bill of discovery.

On the 26 January, 1848, Sir James Wigram, Vice Chancellor, delivered his opinion.

1. That whatever question might at one time have existed upon the point, it is now clear that the question whether the statute of limitations is a bar or not to the relief sought by the bill may be raised by demurrer. There is no question but that is the law where relief is sought in equity, and I apprehend that it is the same where relief is sought at law.

2. That if the cause of action arose when the act of negligence occurred, the statute is a bar, but not so if the cause of action did not arise till the plaintiff sustained the injury. According to the case of *Howell v. Young* the cause of action arose not later than June 1829, when the insufficient notice was given, and I find since the argument that *Howell & Young* is considered to be law in Westminster Hall, and the demurrer must therefore be allowed.—
Vide *London Jurist* of 26 Feb. 1848 p. 130.



Supreme Court of Illinois.

DECEMBER TERM, 1847.

ABRAHAM BADGLEY v. ELI HEALD.

A contract to labor six months for eight dollars a month, is an entire contract; and to entitle the party to recover for his services, he must fully perform on his part, unless released by his employer, or compelled to leave his employment for some justifiable cause.

The opinion of the Court was delivered by CATON, J. from which, as published in the *Western Law Journal* for June 1848, we make the following extract:

“The verdict in this case cannot be sustained by the evidence. By the contract between the parties, Heald was to work for Badgley six months at eight dollars per month, with the right to either party to terminate it at the end of the first month. This was an entire contract—as much so as if the agreement had been to work the six months for forty-eight dollars, with the privilege to either party to put an end to the contract at the end of the first month, when Heald should receive eight dollars. As the agreement was not terminated at the end of the first month, it was then the same as if it had never contained such a provision. The evidence clearly shows, that Heald abandoned the service of Badgley before the completion of the contract, and without the consent of Badgley, or any justifiable cause. Nor can it be said that Badgley subsequently consented to the rescinding of the contract by the payment of the eight dollars, even were that admissible; for, although Badgley did pay Heald eight dollars, yet he did it under a protestation that he was not bound to pay it; for he said “he would not pay him, plaintiff, any more unless he was compelled to pay it by law.” It is manifest from this, that what he paid at that

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time he intended as a gratuity, or did it to buy his peace, under a protest against further liability. It clearly appeared that this work was done under an entire contract which the plaintiff below refused, without any excuse, to fulfil; and the law, as laid down by this and various other Courts, determines that he is entitled to no compensation.

The case of *Lantry v. Parks*, 8 Cowen 63, is precisely like this. There the plaintiff had agreed to work for the defendant one year, at ten dollars per month. He worked ten and a half months, and then left the defendant's service, saying he would work no more till he ascertained whether he could collect his wages. It was there held that the agreement was entire, and that the plaintiff could collect nothing till he had performed his part of it. The same rule is unequivocally held in the cases of *Mc-Millan v. Vanderlip*, 12 Johns. 165; *Jennings v. Camp*, 13 do. 24; *Spain v. Arnott*, 2 Stark. 256; *Decamp v. Stevens*, 4 Blacf. 24; *Ripley v. Chipman*, 13 Verm. 268; *Morford v. Mastin*, 6 Monroe 609; *Thayer v. Wadsworth*, 19 Pick. 349. Numerous other cases might be cited in support of this law, but it is unnecessary. Nor is there any hardship in this rule, as it might at first appear. It is reciprocal, for if the employer turn off the servant before the expiration of the time agreed upon, without any just cause, the latter may recover the full amount agreed upon, as if he had worked out his whole time. *Posey v. Grath*, 7 Missouri 64.

But this is not an open question in this Court. It was the only question involved in the case of *Eldridge v. Rowe*, 2 Gilm. 98, where this Court reversed the judgment of the Circuit Court for overruling a motion for a new trial, where the evidence showed that the party had quit the service of his employer before the expiration of the time which he had agreed to serve, although in that case the evidence showed that Eldridge had made to Rowe three

propositions: 1, that Rowe should work out his time; or 2d, get some other man to work out his time for him; or 3d, that he (Eldridge) would pay Rowe \$30 for what he had done, and let him quit, and that Rowe should let him know on that day which he would do. Within the time allowed, Rowe sent word to Eldridge that he was not going to work for him any more; and yet this Court held that this evidence was not sufficient to authorize the jury to find that Rowe had accepted the third proposition, to quit work and accept thirty dollars for what he had done. And the jury found that the original agreement had been rescinded by mutual consent, and a new agreement substituted, which finding was approved by the Circuit Court, and yet the judgment was reversed, because there was no evidence to sustain the verdict. That is certainly a much stronger case than the one before us.

The judgment is reversed with costs, and the cause remanded.



Supreme Court of Ohio.

HAMILTON COUNTY, MAY TERM, 1848

[BEFORE JUDGES READ AND HITCHCOCK.]

EDWARD TUITE *v.* WILLIAM MILLER.

1. A claim of dower is embraced by the covenant of general warranty.
2. An assignment of dower by a certain share of the rents and profits made charge on the land, and enforced by an order for its collection, is equivalent to an actual eviction of one-third of the land by an assignment by metes and bounds, and putting the widow in possession.

After the decision in 10 *Ohio Rep.* 382, Tuite brought an action of covenant, in the Superior Court of Cincinnati, which was taken by appeal to the Supreme Court.

The case was submitted to the Court, and the facts, as agreed and understood by the parties, were briefly these:

On the 28th of April, 1836, Miller conveyed to Tuite, in fee simple, a lot in the city of Cincinnati, and in the deed covenanted that he was the "lawful owner of the premises, and had good right so to sell and convey the same;" and also that he would "warrant and defend the same against all persons whomsoever."

Elizabeth Satterthwaite filed her bill in the Common Pleas, setting up a right of dower on the lot, prior to the date of Miller's deed, and at November term, 1838, obtained a decree of the Court, establishing her right. And it being ascertained that the dower could not be assigned to her by metes and bounds, a valuation was returned, and the Court finally decreed that Tuite pay her \$62 38 for her dower up to that time, and pay the further sum of \$66 a year thereafter, during her natural life, payable half yearly, in May and November. This was made a charge upon the lot, and in default of payment of any part of it, the Sheriff was ordered to sell so much of the lot as should be necessary to raise the sum due. An order issued, and the first sum due was paid to the Sheriff, with costs, (amount \$87 86,) without levy or sale. Tuite paid the other instalments as they fell due, without further order.

The case, after having been argued several times before the Supreme Court in the county, and in Bank, was again heard at this term.

GHOLSON & MINER, for Plaintiff.

A. N. RIDDLE, for Defendant.

HITCHCOCK, J., delivered the opinion of the Court.—There was no doubt, he said, but that the claim of dower was covered by the covenant of general warranty contained in the deed. The doubt in the case had been whether the facts showed a sufficient eviction to enable the plaintiff to maintain the action.

There must, he said, be an eviction or something equivalent. The regular mode of assigning dower was by metes and bounds, and putting the widow into possession of the part so assigned. Had this been done, it would, without doubt, have been an actual eviction.

The statute provided that when dower could not be conveniently assigned by metes and bounds, it might be assigned in a special manner, as of a third part of the rents, issues, and profits. The manner of assignment, then, was in the discretion of the Court; and any special mode adopted by the Court should be considered as equivalent to the regular mode, and substantially an eviction.

The recovery of the plaintiff was not to be limited to the amounts he had actually paid under the order of the Court, but he was entitled in addition, to the value of the incumbrance, to be calculated according to the tables of annuities, not exceeding one-third of the consideration money and interest since the eviction. And judgment was rendered accordingly for the plaintiff.—5 *West. L. J.* 413.



Supreme Court Judges in Iowa.—The Governor of Iowa has appointed the Hon. S. C. Hastings, of Bloomington, Chief Justice, the Hon. J. F. Kinney, of West Point, and formerly of Ohio, and George Green, Esq., of Dubuque, Associate Justices.—*Western Law Journal for June.*

☞ An important opinion delivered by Hon. A. V. Parsons, reversing a summary conviction by a magistrate, for disturbing a religious meeting, was received too late for the present number.

☞ An able article relative to the decisions upon the statute of limitations will appear in our next.

Supreme Court of Pennsylvania.**MIDDLE DISTRICT.****JOHN CLELLANDS, ET AL. v. THE COMMONWEALTH
OF PENNSYLVANIA.**

1. Where persons are convicted of a riot, although accompanied with the aggravation of riotously rescuing a fugitive slave from his master, it is illegal to sentence them to the Penitentiary.

2. The legitimate imprisonment for such offence is in the county jail. But upon the reversal of the sentence of the court below the Supreme Court, if it deem the illegal imprisonment in the Penitentiary from the time of sentence to the period of reversal a sufficient punishment for the offence, will not sentence the prisoners *de novo*, or remit the record to the court below for the purpose, but will discharge them.

June 5, 1848, BURNSIDE, J. The pl'tfs. in error were indicted and convicted of a riot. The first count in the indictment, is in the usual form. In the second, the riot was laid in rescuing certain fugitives from labor from the state of Maryland, from their masters.* There is no doubt but it was an aggravated case of riot. On being found guilty they were sentenced to pay a fine of one dollar each, and undergo imprisonment for three years in the Eastern Penitentiary, by separate and solitary confinement at labor.

The error assigned, is, in sending the prisoners to the Eastern Penitentiary. Whether the laws of Pennsylvania authorize this is the question before us.

The Attorney General justifies the sentence under the Act of 1705 (Dunlop 16, 1 Smith L. 30) which provides, that if any persons to the number of three or more shall meet together with clubs, staves, or any other hurtful weapons, to the terror of any of the peaceable people or

*This count is given at length in Lewis' Criminal Law 683.

inhabitants of this province, and shall commit, or design to commit, violence or injury upon the persons or goods of any of the said inhabitants, and shall be convicted thereof, such persons shall be reputed and punished as rioters according to the Laws of England ; and such act of terror or violence, or design of violence shall be deemed and accounted a riot : and the 4th sec. of the Act of the 5th of April 1790 (Dunlop 125, 2 Smith 531) which provides, that any person convicted of any offence not capital for which by the Laws (of this state) *in force before* the Act was passed, burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in and upon the pillory, whipping or imprisonment for life is, or may be inflicted, shall, instead of such parts of the punishment, be fined and sentenced to undergo a servitude at hard labor not exceeding two years : and the supplement to the Act of 1790 (Dunlop 194, 4 Smith 393) invests the courts with power to sentence in such cases for any period not exceeding seven years in their discretion.

This leads us to inquire what was the law of England on this subject in 1705, and how far their statutory punishments were introduced into Pennsylvania.

Dalton, who is a writer of authority (page 203) informs us that at Common Law a riot was punishable as a trespass, and as well the fine as the imprisonment was at the discretion of the judges ; and in the same manner the statute 13th Henry 4 enables justices of the peace to punish such offenders. But the imprisonment and the fine of such offenders were to be increased by the stat. 2nd Henry 5 C. 8. and therefrom when they are remiss herein (scilicet) in not sufficiently punishing such offenders by due fine and imprisonment, the Lords of the Star Chamber often assessed upon rioters for the same riot a greater penalty.

The Star Chamber, which was ordained by the 5 Hen. 1 ch. 1 and the 21st Henry 8 C. 2, and which was abolish-

ed by the 16 Charles 1st ch. 10, was vested with special powers to punish riots, routs and such other misdemeanours as were not sufficiently provided for by the Common Law, and for which the inferior judges were not so proper to give correction. In Hawk. P. C. chap. 68, §. 12, we find that formerly, in cases of great enormity, offenders were punished with pillory, but such punishment is now taken away by the 36 Geo. 3d ch. 138.

No English statute on the subject of riots was, it is believed, ever adopted in this province. The 2d Henry 5 ch. 8 authorized the punishment of rioters according to the discretion of the King and his council. 1 Stat. at large 496. The province of Pennsylvania adopted the English Common Law, which was punishment by fine and imprisonment in the county jail, and our sessions occasionally ordered violent men to give security for good behaviour.

It is believed that the pillory was seldom if ever used in this state except when directed by the Legislature of the province. No English statute on the subject of riots was ever adopted by the province. Shortly after the year 1790 all acquainted with the history of Pennsylvania know that in many parts of the Commonwealth violent riots were common. The western insurrection produced liberty poles, and violent riots were the consequences in several counties, and at some death ensued; yet we are not aware that any judge at that day thought he had power to send a convicted rioter to the penitentiary. When I came to the bar, there were old and experienced judges on the bench, and aged lawyers in practice, but I have never witnessed or heard of any person convicted of a riot, being sent to the Penitentiary.

In *Robb v. the Commonwealth*, Mr. Justice Duncan, whose experience in the criminal jurisprudence of the country was more extensive than that of any man of his day, tells us that a sentence which adjudged the convict to

be fed, clothed, and treated as the Law directs, is erroneous, unless the offence is made subject to such treatment by some Act of Assembly. Assault and battery with intent to commit a capital offence, as rape, or murder, or an attempt to commit the crime against nature (offences in their nature infamous,) would fall within that class of offences described in the 4th section of the Act of the 5th of April 1790 as "offences not capital" for which, by the laws in force before the Act entitled "an Act to amend the penal laws of the State," burning in the hand, cutting off the ears, placing in the pillory, whipping or imprisonment for life, was or might be inflicted. Many offences punished in England by infamous inflictions had not been so punished in Pennsylvania before the Act to amend the penal Laws, and I would not be disposed to be governed by such cases in this state, or apply them to the construction of our penal Laws, nor expose any citizen to infamous punishment for undefined offences not in their nature infamous, at the discretion of any court. 6 S. & R. 226. Again, the same learned judge in *James v. the Comth.* 12 S. & R. 220, held, that the ducking stool was abolished. This punishment had been ordered to be inflicted by a court in the city of Philadelphia so late as 1824, on a female in that city who had been convicted as a common scold. He tells us that the Act of 1790 was the abolition of all infamous and disgraceful public punishments for all classes of minor offences and misdemeanors. 12 S. & R. 231.

The pillory, tumbrel, and ducking stool, belonged to the same class. They were punishments inflicted in a barbarous age: were introduced into England by the Saxons: and all who underwent either of them were deemed infamous. 3 Inst. 219. The pillory was the only one of the class that ever disgraced Pennsylvania; and that has been long since abolished. This court never permitted the ducking stool to sully our jurisprudence; nor will it permit the

supposed consequences of the pillory to find footing in our ameliorated system when we have no trace on our records of its application to the crime of riot. If a solitary case is on record, such case is unknown to me, and I would treat it with no respect. If it is deemed salutary and essential to the public safety that such punishments should be inflicted, let the Legislature provide them. Our Laws do not authorize the sentence inflicted in the case before us, and the judgment is reversed.

As the prisoners have been confined in the Eastern Penitentiary about three fourths of a year, we deem this as severe a punishment as if they had been confined in the county jail, where they legitimately should have been sent, for two years. They are discharged.

Charles Gibbons and David Paul Brown, Esquires, for the plffs. in Error.

J. Ellis Bonham, Esq. for the Commonwealth.

Haines township v. Penn township.—Where there is no statute giving appellate jurisdiction to the Supreme Court, and its common law jurisdiction, if it had any, could be exercised only on *Certiorari*, an appeal will be quashed.

Simpson's Appeal.—An arrangement between sons by which they provided a substitute for their mother's dower, which was satisfied by a receipt of the mother under it, estops her from claiming dower. *Per Curiam.* Centre county. Decree affirmed.

Davis, et al. v. Charles.—The confession of a judgment and the issue of an execution thereon for a greater sum than the amount really due, or the object intended to provide for, is not *per se* fraudulent; and if the Plff. only claims what is justly due, and the whole transaction ap-

pears open and void of covin, subsequent execution creditors cannot complain. They do not hinder or delay the subsequent execution creditors, who may take all the money raised, except what is really due on the first executions. **Per Burnside, Justice.** Error to Com. Pleas of Lancaster. Judgment affirmed.

Darst v. Duncan.—The sureties of a Sheriff, or his alienee as his terre-tenant, can come in and make defence to a sci. fa. on a judgment obtained against the Sheriff for neglect of duty, where the Plff. in the judgment did authorize an Atty. to settle with the Sheriff which was done: though they could not defend in the original. The law that a defence of the principal will avail the sureties governs this case. **Per Burnside, J.** Error to York county.

Comth. v. Steele.—The act of 24 of March 1810 entitled “a supplement to the act taxing certain offices” is not to be construed beyond its terms so as to include a Prothy. who has not resigned or been removed from office.

The excess of fees over \$1500 of a Prothy. still holding, cannot be passed over to a year, when the fees did not amount to \$1500, so as to make up the deficiency, before paying over to the Commonwealth the 50 per cent.—“When the deft. resigns or is removed he will be entitled to the benefit of the act of 1818.” **Per Coulter, J.**

Fisher v. Milliken, et al.—The Plaintiff leased an ore mine to Defendants, to be perpetual, or so long as they should continue to use the ore for the furnace specified in the deed; and they covenanted to pay forty cents a load for the ore, but were at liberty to substitute an annual sum of \$250 at their election, to be made at the end of the first year: and further, if they should not so elect they would annually take out and pay for 800 loads. The defts. made no election and their covenant to take and pay for the

number of loads specified became positive, absolute and indefeasible. Thus bound, the defts. sold their furnace and appurtenances, and the assignee entered on the mine. Plff. agreed with assignee to modify some of the terms of the lease. The Plff. was bound to pay an annuity of \$100 to the person from whom he bought the mine, the payment of which had been assumed by defts. Plff. gave liberty to assignee to take 400 loads of ore at 25 cents each to meet the annuity; and at the same rate for whatever else should be taken by him. In all else the covenants to remain intact.

Held: That the modification with the assignee was no surrender or release to the Lessees, and that they are held by the terms of their covenant. No arrangement or dealing of the lessor will relieve at Law or Equity the lessees from their positive covenants, when such dealing does them no injury. There was no privity between the lessees and the lessor as regards the arrangement with the assignee; and the plff. is entitled to recover the value of 800 loads a year at the original price.

Also held: That the assignee might be a witness. He was bound to no covenant but his own. Per Gibson C. J. Writ of Error to Mifflin.

Lowry v. McMillan.—The Plff. below had brought a former suit for breach of promise of marriage, in which the following paper was filed, before the declaration:

"To JAMES STEELE, Esq., PROTHY.

"Sir—You are hereby authorized and required to discontinue *forever* and withdraw the above stated suit *forever* on the presentation of this paper.

" April 11, 1846.

Signed

ELIZA McMILLAN."

The Plff. brought this, a new suit. On the trial it appeared that the words "forever" were inserted after signature, and without knowledge of plaintiff.

It was contended by deft. that the above paper amounted to a *retraxit*, and operated as a bar to the new suit.—The Supreme Court, Coulter J. says:

“A technical *retraxit* has been and is almost unknown in the practice of this State. It is when a plaintiff cometh personally into Court where his action is brought, and saith he will not proceed in it: and this is a bar to that action forever. 2 Jacob, Law Dic. A *retraxit* must always be in person; if it is by Atty. it is error, 8 Rep. 58. 3 Salk. 245. It cannot be before a declaration, for before it is only a non-suit, 3 Leon. 47 2 Lilly’s Ent. 476. In this case the plaintiff did not go personally into Court, and there was no declaration filed. It cannot therefore according to the authorities be considered as a *retraxit*, for although the words ‘withdraw forever’ are used in the paper filed, we cannot suppose that the parties had in their mind a legal technical rule, obliterated, even in the professional mind, merely from affinity of the word *withdraw* to the word *retraxit*. In common parlance withdraw is equivalent to discontinuance.”

The paper cannot be regarded as an estoppel, because there was no consideration for it. Deft. did not give up certain letters as he agreed, and so both parties fell back upon their original rights: and the Court held that it was simply a discontinuance or non-suit, and no bar or estoppel to this suit.

Error to Blair county. Judgment affirmed. N. B. The verdict in this case \$1000.

Hart v. Evans.—When damages arise necessarily and inevitably from a tortious act, they need not be set out specially in the narr. The *tortious act* is the gravamen. The law implies special damage.

In this case the *gist* as laid in the narr. was the diversion of the water course from its ancient channel: and whether this was done by digging through the embankment, or obstructing the bed of the channel is immaterial; though there was evidence of both.

An averment that plttf. was “seized in his demesne as

of fee" is sufficient. Seizin includes possession, but seizin in law would be sufficient to maintain this action. Actual and corporal seizin is taken for granted, when one avers that he was seized, and that he was in possession.

But an actual *pedes possessio* is not necessary to be proved to enable the plttf. to maintain this action (case for nuisance.) The damages was to the freehold as well as to possession.

Per Coulter, J. Error to Dist. Court of Lancaster.

Campbell, et al. v. Jamison.—A will may be republished by parol; but it must have the same legal operation at the time of such republication as when made.

Fulton the testator gave the estate to his wife Rachel and her heirs. Rachel died before testator. Held: that the word heirs was a word of limitation not purchase; that the devise was void; and the heirs, the plffs., could not recover, 4 T. R. 601. Per Coulter, J. Judgment affirmed. Error to Clinton county.

West Buffalo township v. Walker.—A decree of the Supreme Court to quash an order of removal of a pauper is inconclusive; and a private act of the Legislature authorizing proceedings upon the question of settlement, and placing it on its original grounds, is supererogatory. The order to quash is like a reversal on a writ of error, which leaves the parties as they were.

The order of removal was quashed by this Court not on the merits, but because the Sessions had received parol evidence of the existence and contents of an indenture of apprenticeship, without having sufficient proof of its loss or destruction. The act of the Legislature gave the parties no new status, as was the impression of the Court below:

"Properly speaking there are three modes of disposing of an order of removal in the Q. Sessions. The first is to confirm it; and when that

"is done, it appears (Burr. Sett. Ca. 18 and 426,) that the order of the Sessions is conclusive against the appealing parish in favor of all the world. The second is to *discharge* it; and when that is done, the order is conclusive between the parties litigant. The third is to *quash* it; and when that is done, the order is conclusive on neither. An order of removal is confirmed after an unsuccessful objection to it for want of merits, or for want of form, or for want of regularity; it is discharged, or as it is sometimes said *vacated*, after a successful objection to it on the merits; it is quashed for informality or irregularity of proceeding."—Per Gibson, C. J.

Mitchell v. Mitchell.—Where a testator directed his executors to sell his real estate for the payment of debts if necessary, with full power and authority in the will to convey the same, and the executors did sell and apply the money in good faith to the payment of the debts and the other purposes named in the will, the right of dower is divested; and though the widow refused to take under the will, the action of dower at Com. Law against the purchaser will be barred. Per Rogers, J. Judgment affirmed. Error to Mifflin county.

Millican v. Benedict.—Where land is assessed as seated for several years consecutively, and then without notice to the owner assessed as unseated, and afterwards sold for taxes, whether paid or not, the sale is void, so that the purchaser takes no title.

The difference between seated and unseated land is, that the one cannot be, the other can be sold for taxes.

The Commissioners can at any time retransfer land on the seated to the unseated list by giving reasonable notice to the owner, but not without.

The owner and proper officers of the county can by agreement have the land assessed in either list. Per Rogers, J. Judgment reversed. Error to Huntingdon county.

Hays' Appeal.—When two judgments are obtained in a county which is afterwards divided, and the lines of the new county pass through the land bound by the liens, and the eldest judgment is transferred under act of 1840 to the new county and proceeded on therein, and the lien suffered to die in the old county, and the junior judgment is regularly revived in the old county and is not transferred, and the land is subsequently sold by process on the elder judgment transferred to the new county: Held, that the junior judgment regularly revived in the old county will come in and take the money. Coulter, J. says:

“The transfer to Clinton county under the act of 1840, created a new lien from the date of its entry, and did not carry with it the lien from the time of the entry in Centre; otherwise judgments obtained in Clinton bona fide when no liens existed on the records would be defeated by a lien subsequently acquired. To give such interpretation to the act of 1840 would be contrary to its manifest intent, and destructive to the best rights of bona fide creditors; and when extended to other counties as it must be if adopted in this case would be productive of most extensive mischief. The lien acquired by the transfer must therefore date only from the time of its entry on the docket of the county to which it was transferred. Did then the lien of Petriken's judgment which was regularly revived in Centre continue to bind the land in Clinton, on which it originally attached? We think it did. The mere circumstance of the new county line running through the land did not, and could not divest the lien—the *sci. fa.* continued that lien to its original extent.” Judgment affirmed.

Stonebreaker v. Stewart, et. al.—When a Sheriff's deed was traced as probably in the hands of Deft., or was lost, secondary evidence of its contents may be given; and the registration of it in the Prothonotary's office is sufficient proof of its contents and execution. 1 Dal. 69. It would be error to admit the record of it in the Recorder's office before the late act authorizing such recording; for such registration without authority of law is only a copy, and no legal evidence of its execution. But in this case no

harm was done to deft. by its admission, because there was sufficient evidence without it.

A witness must be sworn before giving his deposition; but there was another fatal objection to its admission here; witness refused to answer plaintiff's question.

Another error assigned was that the verdict and judgment were uncertain. The answer to this objection is that the plaintiff filed a description of the land, which defendant did not bring up with the record. It is impossible therefore for this Court to decide in the absence of this description, which it was the duty of plaintiff in error to make part of the record, that the verdict and judgment are uncertain. Judgment affirmed. Error to Huntingdon county. Per Rogers, J.

Neff's Case.—As a surety who has paid the debt of his principal may be substituted to the rights of the creditor, so may the creditors of the surety whose fund has been taken to pay his principal's debt be so substituted as to enable them to receive the debt from the principal to the extent of the fund of which they have been deprived.

In Sept. 1839, the executors of Gwin recovered a joint judgment v. D. Miller, S. Miller and Isaac Neff upon a bill single to which Neff was merely the surety of D. Miller.—Before and after, judgments were recovered by the creditors of Isaac Neff, against him and Neff and Walker.—Among them was one in favor of Smith, which was also against John and Jacob Neff, as sureties of Isaac. Isaac Neff's land was sold, and the money paid into Court. The holder of Gwin's judgment came in and took the money, though D. Miller, the principal, had estate sufficient to pay the Gwin judgment, by a decree of Supreme Court.—This cut out the Smith judgment. John and Jacob, the sureties in it, paid it and had it marked for their use, and they now ask to be substituted in place of the Gwin

judgment, so as to have the benefit of its lien on land of Miller, the principal. In the mean time other creditors of Isaac Neff attached the rights of Isaac in the hands of Miller.

Held: That John and Jacob Neff may be so substituted. Per Bell, J. Decree below reversed. Error to Huntingdon county.

Sheaffer's Appeal.—Where the words of a will run "I will \$1500 to my beloved wife Anna, which said sum shall remain on this property," &c, and devising the property subject to the payment of \$6000, fifteen hundred dollars to the devisee, and "fifteen hundred for my beloved wife," and further directing that the wife "shall receive only the interest of the principal sum set apart during her life or widowhood," with other terms of like import; it was held not to be a gift of the principal sum, and it would not go to the personal representatives of the widow.

The devisee of the land also claimed the principal sum, on the ground that it was charged on the land, and being ultimately undisposed of by the will it must sink into the land for the benefit of the devisee. As to this, the authorities were reviewed, and the rule or conclusion arrived at is "that if the deviser has himself created the charge, and to the extent of it the intention appears on the face of the will not to give the estate to the devisee, it will, to the extent of the charge, the particular object failing, go to the heir and not to the devisee." "The devisee, it is clear, is to pay some one the balance of the \$6000 by the whole will, but it failed to make any disposition of the \$1500, and also the further sum of \$300 of said balance is not provided for."

Held: That these balances descend to the heir at law, and are considered as so much land.

"This is the conclusion at which the Orphans' Court correctly arrived. But conceiving that the testator died intestate as to the two sums which remain specifically undisposed of, it was thought the Court could not entertain jurisdiction of the petition under the 59th Sec. of the act of 24 Feb. 1834. This is a highly remedial act."—"We are not to restrict its operation by a literal adherence to its very terms, but may without impropriety bring under its active influence every case that can reasonably be embodied within its spirit." In Mohler's appeal, decided at the present sitting, 7 Pa. Law Jour. 382, it was held that the act gave jurisdiction to the Orphans' Court to decree the personal liability of an alienee of land charged by will with the payment of an annual sum.

Held: That the Orphans' Court has jurisdiction in the case, under the 59th sec. of the act of 24 Feb. 1834, as for a legacy charged on land. Per Bell, J. Appeal from Orphans' Court of Lancaster.

In the Common Pleas of Lancaster county, Pa.

COMMONWEALTH, FOR THE USE OF ANNA M. GEIGLEY'S ADMR., vs.
JOSEPH STOFFER, EXR. OF WM. GEIGLEY, DECEASED,
WITH NOTICE, &c.

1. W. G. devised to his widow all his real and personal estate; "Provided she remain a widow during her life; but in case she should marry again, my will is, she shall leave the premises and receive all the money and property she had of her own, or that I received of hers." *Held*, that the condition in restraint of marriage is void, and the second marriage of the widow does not divest her estate.

2. *Held, also*, that the devise being of *real estate*, does not vary the case so as to enforce an unqualified condition in restraint of marriage.

On the 26th June, 1848, LEWIS, President, delivered the following opinion of the Court:

This is a case stated, in the nature of a special verdict. William Geigley died without issue, leaving a widow, fa-

ther, mother, brother, and sister. His will, which was made on the 12th June, 1833, and proved in the month of October of the same year, contained *inter alia* the following clauses:

"I will and bequeath to my loving wife Susan Geigley all my real and personal estate that I am possessed of (with a few exceptions that I will hereafter bequeath to my brother George, &c.) *Provided* my wife Susan remain a widow during her life. But in case she should marry again, my will is she shall leave the premises and receive all the money and property she had of her own, or that I received of hers."

After several small legacies to other persons, the following clause appears:

"It is my will and desire, that if my wife remains a widow during her life on the premises, that after her death all the money and property that I got or had of my wife's shall be paid to her friends whomsoever she wills it to, and all the property belonging to me as my own at my death (not including my wife's part) I will and bequeath to my father and mother if living. But if *they* are both deceased, my will is that my brother George Geigley and my sister Catharine Geigley shall have the whole of that share or part that was my own, to them their heirs and assigns forever."

The real estate was sold for the payment of debts under an order of the Orphans' Court, and the widow having married a second husband, the present action is brought by the representatives of the testator's mother (who survived her husband) to recover the balance of the proceeds of sale in the hands of the defendant. There are other facts upon this record, which are thrown out of consideration because the case is determined exclusively on the question arising upon the condition in restraint of marriage.

A distinction has been supposed to exist, certainly more inveterate than rational, in favor of *limitations* as opposed to *conditions* of this description, but a review of the cases on which this distinction is supposed to exist is dispensed with because the case before us is the case of a *condition*. It may not be amiss, however, to remark that the Vice Chancellor of England, so late as Nov. 1846, without

taking notice of the supposed distinction in favor of *limitations*, held in general terms that "all *limitations* in restriction of marriage were objectionable." Elizabeth Castle's case. L. Jurist. Dec. 26, 1846.

A condition *precedent* stands on peculiar ground, and has been sustained upon the technical principle that the estate does not vest until the condition is performed. But the decisions on this branch of the law are also thrown out of consideration, because the case upon this record is that of a condition *subsequent*. The estate has vested, and is not divested by a disregard of the condition, if the latter be against the policy of the law.

The adjudications on conditions requiring the *consent* of *parents*, or *others standing in their place*, stand also upon a principle not involved in the case before us. There may be circumstances to justify a reasonable restriction of this nature, to guard youthful indiscretion against imposition. But wherever no sufficient reason exists for withholding consent, or the consent itself is required for the purpose of restraining the marriage, the condition is disregarded. 2 Atk. 261. Ambl. 662. A restraint even for six years, without any justifiable reason for it, has been considered as falling within the prohibition. 10 East. 22.

It has been held that a devise over to a secondary devisee upon the violation of the condition, was a circumstance which would justify the Courts in sustaining conditions of this kind. This circumstance cannot relieve a condition in restraint of marriage from the objections founded upon the great principle of public policy involved; and it is rapidly losing its power, as the light breaks upon the judicial mind. It has been held that a residuary clause—or a devise over without a particular description of the property to pass by it, will not enable the Courts to enforce the forfeiture. A devise over to the heir at law will be equally inoperative. 6 Mass. 169. A

devise which does not *create* an interest to take effect *immediately* upon the happening of the contingency will be equally ineffectual. *ib.* The decisions in which these principles have been announced may be regarded as the vigorous struggles of the common law to free itself from a doctrine resting upon no substantial foundation. But we are not controlled by the cases on this branch of the subject, because we have here no devise over upon the happening of the forbidden contingency. The devise over presupposes the enjoyment of the estate by the widow "*during her life*," and is to take effect, *not upon her marriage*, but "*after her death*."

Distinctions, resting upon the question whether the legacy is payable out of the *real* or *personal estate*, are said to exist. But Mr. Justice Kennedy, in an able opinion delivered in the case of *Middleton v. Rice* (6 Penn. Law Jour. 234) cites from Mr. Jarman's edition of *Powell on Devises* (2 vol. 291) the opinion there given that "even 'in regard to real estate it seems generally admitted that '*unqualified* restrictions on marriage are void.'" And the learned Judge further remarks that "this is the universal opinion entertained by judicial men on this point." 6 Penn. Law Journal 234.

It may well be doubted whether the English decisions, so far as they, in any respect, countenance restrictions upon marriage, are applicable to the exigencies of a newly established nation. Possessing an extent of uncultivated territory almost unlimited, and relying upon the increase of population as the chief element of national strength, it would seem to be the policy of this country to discountenance every restraint upon that legitimate intercourse which results in the reproduction of the human race. Our ancestors may be considered as having brought with them the wholesome doctrines of the common law without the embarrassments produced by departures from

its principles under the constraint of circumstances peculiar to a country already overstocked with inhabitants.—A principle which generally governed the common law courts is that “if a portion be given in consideration that “the daughter should *never* marry, such a condition should “be rejected as repugnant to the original institution of “mankind.” Com. R. 729. And the doctrine which prevailed in the Ecclesiastical courts was that “all conditions “against the liberty of marriage are unlawful as being a “restraint on the natural liberty of mankind and an hindrance to the propagation of the Species.”* 4 Burns’ Ecc. Law. 152.

Marriage is a wise regulation in harmony with nature and religion, and is the only efficient preventive of licentiousness. The happiness of the parties and the interests of society require that it should be free from either coercion or restraint. Bonds to procure and contracts and conditions to restrain are alike forbidden. It is the appropriate regulation of that great instinct of nature which was designed by the creator to replenish the Earth. It is upon this authorized union that all civilized nations depend for their prosperity in peace and their defence in war.

The principle of reproduction stands next in importance to its elder born correlative, self preservation, and is equally a fundamental law of existence. It is the blessing which tempered with mercy the justice of expulsion from Paradise. It was impressed upon the human creation by a beneficent Providence to multiply the images of himself and thus to promote his own glory and the happiness of his creatures. Not man alone, but the whole animal and vegetable kingdom are under an imperious necessity to obey its mandates. From the lord of the forest to the monster of the deep—from the subtlety of the serpent to the innocence of the dove—from the clas-

tic embrace of the mountain kalmia to the descending fructification of the lilly of the plain, all nature bows submissively to this primeval law. Even the flowers which perfume the air with their fragrance and decorate the forests and fields with their hues, are but "curtains to the nuptial bed."

The principles of morality—the policy of the nation—the doctrines of the common law—the law of nature and the law of God unite in condemning as void the condition attempted to be imposed by this testator upon his widow.

Let judgment be entered for the defendant.

Messrs. Parke and Hiester, counsel for the Pltff.

Mr. McElroy, counsel for the Def.

Supreme Court of New York.

NEVIN v. LADUE AND OTHERS, OVERSEERS OF POOR, &c.

1. Ale and strong beer are included in the terms *strong or spirituous liquors*, as used in the statute, (1 R. S. 680, § 15,) making it penal to sell such liquors in a small quantity without license.

Error to the Putnam common pleas. Ladue and Nelson, as overseers of the poor of Phillipstown, sued Nevin before a justice of the peace in debt, to recover a penalty of \$25 for selling strong or spirituous liquors in a less quantity than five gallons at a time without having a license therefor, contrary to 1 R. S. 680, § 15. The declaration was in the form allowed in declaring upon penal statutes. The defendant pleaded the general issue. On the trial the defendant, as the return states, "being charged by the plaintiffs with the sale of ale, strong beer

or fermented beer, without a license therefor, confesses the charge in person, and claims it is not prohibited by statute." The cause was argued by counsel, and the justice rendered judgment for the plaintiffs for the penalty, with costs, whereupon the defendant brought a *certiorari* to the common pleas, where the judgment was affirmed, and he then brought error to this court.

Fullerton and Fowler, for the plaintiff in error, maintained that ale, beer and other fermented liquors were not included within the terms "strong or spirituous liquors," as used in the statute.

E. Yerks, for the defendants in error.

By the Court, JEWETT, J. This case involves a question upon the true construction of the statute. (1 R. S. 680, § 15.) It is in these words, "Whoever shall sell any strong or spirituous liquors, or any wines, in any quantity less than five gallons at a time, without having a license therefor, granted as herein directed, shall forfeit twenty-five dollars." If ale or strong beer answers the description of strong or spirituous liquors, the action was well sustained. I am unable to entertain a doubt but that both come within the definition of *strong* or *spirituous* liquors. *Beer* is defined by Webster to be "a spirituous liquor made from any farinaceous grain, but generally from barley, which is first malted and ground, and its fermentable substance extracted by hot water. This extract or infusion is evaporated by boiling in caldrons, and hops or some other plant of an agreeable bitterness added. The liquor is then suffered to ferment in vats." *Ale* is a liquor made from an infusion of malt by fermentation; it chiefly differs from beer, in having a smaller proportion of hops—and both are intoxicating liquors. The manufacture of beer and its use as an intoxicating drink, are of very high antiquity. *Herodotus* tells us, that owing to the want of wine, the Egyptians drank a liquor fermented from bar-

ley. (*Lib. 2, chap. 77.*) Ale or beer was in common use, in Germany, in the time of Tacitus. "All the nations," says Pliny, "who inhabit the west of Europe, have a liquor with which they intoxicate themselves, made of corn and water. The manufacture of ale was early introduced into England. It is mentioned in the laws of Ina, king of Wessex; and is particularly specified among the liquors provided for a royal banquet in the reign of Edward the Confessor. (*McCulloch's Com. Dic. vol. 1, p. 9.*) That the legislature intended to prohibit the sale, under the regulations mentioned in the 15th section, of all intoxicating liquors, I think is strongly indicated by the provision of the 29th section of the same statute. It enacts that "No person shall be subject to be prosecuted by virtue of the provisions of this title, for selling metheglin, currant wine, cherry wine, or cider." This operates as an exception to the prohibition which I think is manifestly contained in the former section. Each is strong liquor, intoxicating in its nature. It is urged by the counsel for the defendant that the legislature, by the use of the words "strong or spirituous," meant to include only such liquors as are produced by distillation. It is quite pertinent to ask why, if this were so, it was necessary to insert the 29th section, as neither of the kinds of liquor there specified are thus produced. I think this a plain case, and that the judgment should be affirmed.

Judgment affirmed.

Medical Jurisprudence.

THE COMTH. v. WILLIAM FRITZ.

In the Quarter Sessions of Perry county.

1. It is impossible for a mother to decide to which of two or more connexions about the same time her conception is to be imputed."

This was an indictment for Fornication and Bastardy. The mother of the child was examined as a witness on behalf of the prosecution. On the cross examination the counsel for the defendant proposed asking her if she had connexion with any other person *about the time* when the child was begotten. To which the counsel for the commonwealth objected.

The opinion of the court was delivered by the late Judge Reed, then the eminent and learned President of that District. From that opinion furnished by a friend we copy so much as relates to this point.

"By the court, Reed, President. The prosecutrix has voluntarily become a witness ; she has therefore waived the privilege of not being compellable to criminate herself, or to publish her own infamy. If she speak at all she must do both the one and the other. The terms of the oath administered to her, require that she should relate every fact within her knowledge material to the issue. Whether any other person than the one charged had connection with her *about the time* the child was begotten, is a fact extremely important in the inquiry. For if the affirmative be the fact, it would be physically impossible for the mother to decide to which of two or more connexions about the same time, her conception is to be imputed. The inquiry therefore directly affects the *knowledge* of the witness in relation to the precise fact to which she deposes. It is not to test the veracity of the witness, but her knowledge of the fact, of which she speaks. It would be perverting justice to suffer the witness to re-

Vide Lewis' Cr. L. 47.

late just so much as makes in her favor, and to withhold facts essentially connected with those related and the issue trying.

Judge Swift in his digest of the law of evidence, pp. 80, 81 states that the question is proper, and assigns reasons that to my mind are incontrovertible and conclusive.

The objection is overruled by the Court."



New Publications.

The Western Law Journal.—This periodical is published at Cincinnati and is edited with judgment and ability, by J. Walker and C. D. Coffin, Esquires, of Ohio, and C. Gilman of Illinois. We always devour its contents with great eagerness. It is quite a mistake to suppose that we must always look to the old States for "the gladsome lights of jurisprudence." The diversified interests of western life give rise to a great variety of new and important questions; and the ability with which they are discussed and disposed of by the fresh and giant intellects of the West command our highest admiration.



AN ANALYTICAL AND PRACTICAL SYNOPSIS of all the cases argued and reversed in Law and Equity, in the Court for the correction of errors of the State of New York, from 1799 to 1847; with the names of the cases and a table of the titles, &c. By Ralph Lockwood, Counsellor at Law, New York: Published by Banks, Gould & Co. Law Booksellers, No. 144 Nassau street; and by Gould, Banks & Gould, No. 104 State street, Albany. 1848. pp. 603.

This book is intended as a synopsis of all the decisions of the late Court of Appeals in New York from the com-

mencement of the State Reports until the new organization under the Constitution of 1846. These various cases are scattered through the pages of no less than *ninety* volumes. It appears that the total number of cases reversed from 1799 to 1847 has been two hundred and forty. The industry and ability displayed in this collection of cases cannot fail to be of great service to the profession. The machinery for consulting the book is ample and excellent. We have in the beginning of the volume a table of the cases reversed and the subject matter briefly stated; then a table of the cases affirmed; next a table of the titles; and at the end of the book we have a table of titles and of the cases contained in each; thus, much facility is given to reference. The profession are often much embarrassed by conflicting or unsatisfactory decisions, especially in the great maritime States, and no more grateful labor could be performed than this which Mr. Lockwood has given us.

We take much pleasure in commending his valuable labors to our brethren of the bar.

REPORTS OF CASES in the Supreme Court of Judicature of New Hampshire. Volume XIII. Second Series. Volume I. Concord: Published by Asa McFarland.—1847. pp. 614.

This volume is in the usual excellent manner of the New Hampshire Reports. The cases contained in it are unusually interesting and some of them of great general importance. It does not appear from the printed volume who the reporter is, but if we remember rightly it is one of the Judges of the Court. The cases are certainly reported with much care and discrimination; the reporter's notes appear to be well prepared and accurate. This is

the first volume of the *second series*, or volume thirteen of the old series; it certainly is in every way worthy of the high character of the New Hampshire bench and bar.—The opinions of the Court are marked by brevity and accuracy. This volume brings the cases down to July Term 1843, and embraces those decided from July Term 1842.

A DESCRIPTIVE AND HISTORICAL ACCOUNT of hydraulic and other machines for raising water, ancient and modern: with observations on various subjects connected with the mechanic arts; including the progressive development of the Steam Engine; descriptions of every variety of bellows, piston, and rotary pumps: fire engines; water rains; pressure engines; air machines; eolipiles, &c. Remarks on ancient wells, air beds, cog-wheels, blowpipes, bellows of various people: Magic goblets; steam idols and other machinery of ancient temples. To which are added experiments on blowing and spouting tubes, and other original devices; nature's modes and machinery for raising water. Historical notices respecting Siphons, fountains, water organs, clepsydræ, pipes, valves, cocks, &c. In five books, illustrated by nearly 300 engravings. 2d edition, revised and corrected, to which is added a supplement. By Thomas Ewbank. New York: Greely & M'Elrath, Tribune Buildings. 1848.

We have examined Mr. Ewbank's work with some care, and with much satisfaction. The publishers, Messrs. Greely & M'Elrath, have performed their part in a highly acceptable manner. The illustrations (nearly 300 in number) are executed with neatness, and enable the plainest mind to comprehend readily the descriptions. The farmer may here learn the various methods of irrigating his land, and of elevating water to a convenient level for his stock or for other purposes. The mill-wright, the pump-maker, the manufacturer of steam engines, fire engines,

or hydraulic machinery of any description, may possess in this book a repository of knowledge connected with his art which he can find no where else in a form so useful and accessible. By a reference to this work, he will be enabled to understand the *principles* of his trade, and thus be ready to remove difficulties when they occur. It is said that a Yankee pump-maker, who accompanied our victorious army to the city of Mexico, has been engaged ever since his entrance into that city, in ineffectual efforts to construct a common atmospheric pump to raise water as high as the same mechanism would raise it in New York. It is rumored that he is still engaged in his efforts, but has not yet ascertained the reason why he cannot elevate the water above 22 feet. Had he perused Ewbank, he could not have thus exposed himself to the ridicule of the Mexicans.

To elevate the standard of professional knowledge is an object which we have much at heart. The advocate who aims at success and respectability in his profession, should not be ignorant of the arts and sciences, and the principles of philosophy upon which they are founded. He will find such knowledge highly useful to him in almost every cause. In the trial of water right cases, in controversies respecting patent rights, or concerning the mechanical workmanship of steam engines, or other machinery connected with the wide range of subjects treated of in the work before us, the gentlemen of the bar will find the labors of Mr. Ewbank highly useful in lessening their own. Indeed we know of no work in which these subjects are at once so fully, so ably, and so familiarly discussed.

AN ABRIDGMENT OF THE LAW OF NISI PRIUS, in two volumes. By William Selwyn, Esq. of Lincoln's Inn, with notes and references to the Decisions of the courts of this country, By Henry Wheaton, Thomas I. Wharton and Edward E. Law. Sixth American Edition.—With a Supplement containing notes of recent English and American authorities. By J. G. Marvin. 2 vols: Philadelphia : Thomas, Cowperthwait & Co. 1848.

This appears to be the former edition of Selwyn's *Nisi Prius* published in 1839 from the ninth London Edition, with the new matter in the latter Editions added in the shape of a supplement. The reason for not reprinting the entire work is given by the editor Marvin in his Preface "a portion of the last American edition still remaining on hand, the publishers, in order to increase its usefulness, determined to have notes of recent American cases, as well as the pertinent new matter found in the eleventh English edition, arranged as a Supplement to it. The following pages embrace such new supposed pertinent matter, together with notes of American Cases, from 1839 to the present time. Notes of some cases omitted by former editions of Selwyn, have also been made, together with references to some late publications where the same subjects embraced in the following supplement have been elucidated." This supplement embraces more than three hundred pages, and so far as we can judge from a hasty survey and examination the editor has exhibited the same commendable and really useful industry that the profession discovered in the "Legal Bibliography." Selwyn's *Nisi Prius* is a book that cannot well be superseded. It was first given to the profession in 1806 and has reached *eleven* English Editions, and *six* American: and is to be found in all well selected Law Libraries. We think Messrs. Thomas, Cowperthwait & Co. (the publishers) have laid the profession under obligation by bringing down the cases and authorities to the latest dates under the revision of the present editor.

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AUGUST, 1848.  
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INTERNATIONAL COPY-RIGHT.

In the June number of this Journal the fact was noticed, with some brief comments, that William C. Bryant, and others, had petitioned Congress to pass an Act giving to English and American authors the same protection for their works in both countries they now enjoy respectively in their own. This movement is by no means new. For the last ten or twelve years scarcely a session of Congress has gone by without some agitation of this subject; and though, up to the present time, that agitation has produced no result, it is far from certain that such will always be the case. Perseverance will accomplish wonders, and it may be that few years will elapse till the prayer of the petitioners shall be granted. It is certainly time the question should be settled one way or the other, and whether the proper mode of doing so would be by passing, or refusing to pass, a law for an international copy-right is what we now propose to examine.

For the enactment of a law of this description various
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reasons have been urged, the principal, indeed the only one of which requiring consideration, is the alledged injustice and immorality of appropriating to public use the labors of an author without giving him a fair and adequate compensation. In other words, it is contended that an author has, on the principles of reason and natural law, a property in his published productions to which he has the exclusive right. Assuming this position as incontrovertible, the friends of the measure proceed to denounce the publication of an English work in America, and *vice versa*, as a violation of natural right, an unauthorized invasion of private property, a literary larceny or felonious taking and carrying away the personal goods of the author ; a crime, if proven, certainly heinous enough to justify preventive legislation, if not the corporal punishment of the perpetrators.

But has this grave charge been proved ? Is it quite certain the right of property has been infringed ? Should we be able, as we think we shall, to show that the charge has not been proved, that no right of property has been violated, it will follow that no protection ought to be given to an asserted right which never existed save in the imagination of those who seek to derive, in a double sense, a benefit from the creation of their own fancies.

The question then resolves itself into this : Has an author an exclusive right to his work after publication ? In its consideration the fact must be constantly borne in mind that with rights depending on positive enactment we have nothing to do. Whether an act be just or unjust, moral or immoral, depends upon its agreement or disagreement with the law of nature, and not upon the notions which may be entertained respecting its expediency at any particular period of time. On its intrinsic justice, or by its incompatibility with the teachings of enlightened reason, must the right we are now to discuss stand or fall.

If the claim has natural right and justice on its side let it be granted without further delay, but if after being weighed in the balance it should be found wanting, let there be an immediate end of all agitation on the subject.

The first inquiry which naturally presents itself to the mind is relative to the nature of the object in which this right of property is claimed, for if upon examination it should be found incapable of ownership it is evident there must at once be an end of the question. No one has ever yet set up a claim of property in the light or the air, and if in the present case the materials sought to be appropriated should be found equally free and common in their nature, it will be seen at a glance they are equally incapable of being made the subject of permanent dominion.

We think it must be clear to every person, who bestows the least consideration upon this matter, that every literary production can consist of only two things ; *thoughts*, which constitute the raw material, and *mode of expression*, the workmanship necessary to put these thoughts into presentable form. Whether either of these can be the subject of property is the next point to be determined, and upon that determination we apprehend depends the solution of the question.

Turning our attention in the first place to the raw material, we take it as conceded that ideas do not spring up spontaneously in the human mind, and that men obtain them solely through the medium of their senses operated upon by external objects. Ideas being thus acquired are within the reach of all who can taste, smell, hear, feel and see, and as those external objects from which one man has received ideas still exist, another man, or million of men at the same or some subsequent period of time, may obtain precisely the same ideas from the same source. In such case who would have an exclusive property in a particular idea ? Certainly no particular individual, be-

cause the whole number have it by original acquisition and it is as much the property of one as of another. As well might a man claim a permanent property in the rays of the sun as to say that his ideas, whatever they be, are exclusively his own.

Thoughts are the results arising from the contemplation of ideas previously existing in the mind. Those who have ideas must think, for though the mind may have its periods of repose, it is impossible it should remain constantly inactive. This being clear, may not a thousand different persons, having the same ideas, contemplate or compare them in the same way and thus produce the same result or thought? If so, then to whom does that particular thought belong, A. or B.? C. D. E. and F. who in the same way, from the same source, have obtained the same thought have certainly as much property in it as either of the others; nor is the principle of the case in the least altered if we extend the number to millions.

But then it may be objected that some persons will acquire knowledge from the contemplation of ideas never before perceived, and that in this knowledge they have an exclusive property, at least till the same knowledge has been acquired in the same way by others. To this we answer, it is true that he who first perceives an idea has an exclusive possession, but it does by no means follow that because he has the exclusive possession he has also the right of property. So far from having a property in his ideas we think it will not be very difficult to show that a person thus circumstanced has not even a right to the exclusive possession.

Suppose a man by accident, or from reflection, discovers an infallible cure for the cholera, does the mere fact that no one knows it but himself give him a right to conceal his knowledge from the world? While the arrows of death are indiscriminately striking down the young and

the old, while thousands are daily sinking into premature graves, would he, as a man depending for his social happiness on the kind offices of his fellow men, as a christian, as a being accountable to God, be justified in keeping exclusive possession, when the utterance of perhaps a single sentence would be the means of restoring the husband to his wife and the mother to her child? Those who should claim for him a right to do so, on the grounds of reason or natural law, must have reasoning faculties strangely perverted and very loose notions of moral obligation.

But suppose the original discoverer does keep his secret till some one, surreptitiously, it may be, finds it out and makes it generally known. In such case, would the person who first perceived the idea have any natural right to prevent the rest of mankind from using it? If he has a right of property in it he ought certainly to be able to do this, but would not the assertion of a claim so unfounded startle the moral sense of the world. Put the question to every individual of every nation and tribe on earth, and all, except those whose judgment is warped by the promptings of interest, will respond, that one who could thus act, even supposing the right of doing so to have been conferred upon him by positive law, is unworthy the name of man and little better than a fiend in human shape.

There are men who from attentive study of the Bible believe they have discovered that all war is murder, and that all who slay their enemies on the field of battle are murderers, and as such, dying without repentance, must go to eternal perdition. Now, in the opinion of the man who made it, here was a discovery, a knowledge of which was necessary for the salvation of a large portion of mankind. Admitting for the argument the doctrine to be true, had he who discovered it a right to keep all men

out of Heaven unless they first paid for permission to mould their practice according to the truth? Admit that he has a natural right of property in his discovery and at the same time you admit he has a natural right to cause, if he pleases, the eternal ruin of millions; a proposition from which the moral sense of mankind turns with instinctive abhorrence.

The power to profit by the discovery of a new idea and the right to do so are two distinct things. While knowledge remains locked up in the breast of one man he may enjoy all the advantages which arise from his exclusive possession, but suppose he imparts that knowledge to another, what then becomes of his exclusive right, if ever he had any? Does not the gift pass by delivery, and is not his right, and his power to reclaim it "clean gone forever."

All invention, whether literary or mechanical, is the result of thought, and therefore any right to that invention, whether real or imaginary, must rest on the same foundation. If a man has no natural right to an exclusive property in the one, he cannot, on any principle of sound reason, claim it in the other. Whether he has any right to or property in either let us endeavor to ascertain by reference to examples drawn from the extremes of savage and civilized life.

A savage roaming through the forest observes that a young sapling may be forcibly bent, and that so soon as the pressure is removed it resumes its natural position: he thus obtains an idea of elasticity. He has likewise observed that certain substances may be twisted into cords possessing strength and flexibility, and besides this he has seen that under certain conditions a noose will tighten. He compares all these ideas, and the result of that comparison is a thought producing a new and complex idea, the sensible representation of which forms a snare. If he

is an ill natured savage he will keep this knowledge to himself and by its means procure an abundant supply of game. Another savage, with a better sense of the duty he owes to his race, happens to see it, and charmed with his newly acquired knowledge makes the secret known to the whole tribe, the members of which immediately avail themselves of the facilities it affords for the supply of their wants. The original inventor no longer possessing a monopoly of snares calls a council of the tribe, claims a property in the invention and demands that every savage who snares game shall give him a portion of it as a compensation for thinking that particular thought. How would such a proposition be received by those rude children of nature? We think that when the astonishment which the strange demand created had in some degree wore off, it would not take them long to decide upon its merits. An old chief would probably rise and deliver his opinion in the following manner. "The Great Spirit created game for the use of his children and taught our fathers to make bows and arrows and how to use them. By this knowledge, freely imparted to our brother, was he enabled to procure meat for himself and his children till the Great Spirit put it into his mind to invent new means of providing for his and their necessities. The bow and the arrow have ever been common to all and so must be the snare of our brother." From this judgment would any dissent except the party interested?

A civilized man sitting by his fireside observes that steam blows the lid off his tea-kettle. From the knowledge thus obtained, combined with what he had before, he constructs a rude steam-engine, which in its operation suggests new ideas, affording new subjects of comparison with ideas previously acquired, and the result is the steam engine improved. A few years roll by and a thousand wheels impelled by steam are revolving in the air. Some one

thinks that two wheels might still revolve if partially immersed in water. That thought materially represented is a steamboat; but is not the creation of that steamboat as much the result of other men's thoughts as of the thought of the original inventor? Let the common sense of the world answer.

If a man has a property in his thoughts after publication, then that property must remain to him and his descendents forever. The Marquis of Worcester, his heirs or assigns, must have in them the right to his thought at the present moment, and the same must be true of Bolton and Watt, Fitch and Fulton with regard to their thoughts on the same subject. If this be true, then the appropriation of Worcester's thought, as the foundation of the improvements of Bolton, Watt, Fitch and Fulton, must have been a violation of the rights of property deserving the censure of all honest men, and which, if committed in relation to any thing having a tangible existence would consign the perpetrator to the walls of a penitentiary.

Now this conclusion, which is irresistibly forced upon us by the premises, must be either true or false. If true, then the advocates of property in thought have made the discovery of an idea of which the world never dreamed. What! make it a breach of morality and of course deserving of punishment for a man to give birth to a thought by the comparison of a new idea of his own with ideas as old as the human race? The proposition is monstrous and of itself proves beyond the possibility of doubt the falsity of the original premises.

But again, supposing the conclusion we have drawn above to be true, what are its consequences. If every man has a property in his thoughts, and A. dare not without an act of immorality make use of the thought of B. then all thoughts must forever remain in the shape they were originally conceived and the march of improvement

would be stopped forever. Without a knowledge of Worcester's thought it is very improbable that Watt would have ever made a steam engine. Without knowing and making use of all the previous knowledge relating to the subject, it is next to an impossibility that Fulton would have ever constructed a steamboat.

A claim so inimical to human progress, so much opposed to the welfare and happiness of our race, with such potent tendency to keep the world in a state of barbarism, can never be sanctioned by the law of nature.

With regard to the second constituent part of every literary production, viz : the mode of expression, we suppose there can be no difficulty. Language is the common property of all, and no one will be foolish enough to claim a property in the words he has written or spoken, whether he has published them or not. In the arrangement of the twig, the string and the peg, the savage could have no property, because it was that peculiar arrangement which constituted the essence of the thought itself. In like manner it is the peculiar arrangement of the wood, the metal and the words which constitutes an organ, a steam engine or an epic poem, and if there is no property in the arrangement of the materials in one case, distinct from the thought, which that arrangement represents, there can be none in the other. When there is no property in any of the parts there can be none in the whole.

Having thus, we trust, made it clear that an author or inventor has no natural right of property in his work or invention, after publication, and consequently that there can be no infraction of morality in the republication of one or the use of the other, it follows, that whether either of these classes shall be allowed to have a property in their works or inventions after publication, must depend solely on considerations of expediency. When it is required for the public good that authors and inventors should be

protected, then it becomes proper that protection should be afforded ; but if on the contrary the public benefit requires that thought should be free from taxation, then it becomes equally proper and meritorious to withhold that protection and confine all who choose to write or invent to the profits arising from the sale of the work or invention, which is always considerable upon the introduction of any thing new, whether literary or mechanical, that is really entertaining or useful.

And this raises the question whether it is necessary at the present time for the benefit of the public that Congress should pass a law granting an international copy right, a question which will be most readily answered by inquiring who are the persons to be benefitted by the introduction of the proposed measure. In the United States there is certainly not many more than one in a million who could derive the least advantage from it, while the other nine hundred and ninety nine thousand, nine hundred and ninety nine would be the losers. If the works of foreign authors are calculated to spread the light of science, to diffuse knowledge, to train the mind and affections in the way they should go, and thus bring about a more exalted civilization, why put an additional tax upon the fountain from which millions are to drink the waters of life? If on the contrary the tendency of foreign literature is to corrupt the public mind, to sow the seeds from which spring luxury, effeminacy and vice, as is to be feared, then the public pay quite too much already for the poison, without being compelled to build up magnificent fortunes as a reward to those whose works have fanned into flame the worst passions of our nature.

There is another fact connected with this subject which should not be passed over without some consideration.— Compared with Europe our country is yet in its infancy. There, immense wealth gives time and means to many to

pursue, undisturbed by the cares of life, the most abstruse studies, while, on the other hand, the crowded state of all active modes of employment forces many more to seek the means of living through the presentation of knowledge to the mass in forms the most attractive. Here, the case is widely different. No part of the United States can yet be regarded as densely populated, while an almost boundless extent of territory is still to be brought under the dominion of the agriculturalist. The consequence is that physical labor, or that peculiar species of mental exertion which tends to supply its place, affords abundant employment for all who have minds to think or hands to work.—Our people busily engaged in clearing away the forest, in building houses, and ships, and rail-roads, in cultivating the land, and in a thousand other different modes to procure the necessities and comforts of life, have very little time to spare for labor purely literary. For the supply of their wants in this particular they must depend almost wholly upon the productions of foreign writers; and for this reason, if for no other, it would be the extreme of folly to burden American readers with a heavy tax upon knowledge or amusement. But the time may come when this objection will loose its force. When the Great West shall have been filled up, when the earth is subdued and made available to the uses for which the Creator designed it, in a word, when all the demands of labor are satisfied, America will produce writers in every department of literature and science whose productions will be read and admired throughout the world. When that period arrives an equilibrium will be established between the mental efforts of the Old continent and the New, which may render the existence of an international copy right necessary and expedient, but till it does come, we cannot regard the attempt to impose additional restrictions on the acquisition of knowledge in any other light than as a

wanton encroachment on the rights of the public.

It has been well said that power is always stealing from the many to the few, and should the prayer of the petitioners for the passage of an international copy right law be granted, while the country remains in its present circumstances, it will only add one proof more to the mass of evidence already accumulated tending to show the correctness of the rule. In the dark ages there was a feudal aristocracy which possessed itself of power forcibly by the sword. That mode of acquiring power is now disused, but the same object is attained by different means. In these enlightened days there is an aristocracy of the pen who acquire power through the agency of the press. As the old iron-clad aristocracy recedes from sight in the deep twilight of by gone years, the new marches prominently into view and boldly challenges from the world a recognition of its claim to exclusive privileges. Whether it is politic to yield, for at least a century to come, all that is demanded, and bow our necks submissively to the yoke, is a question the practical solution of which we leave to the decision of those most directly interested.

We have already said that with existing municipal regulations relating to the subject we have nothing to do.— Perhaps the laws now in force are as beneficial to both parties, writers and readers, as could well be devised.— Many productions undeserving of the slightest favor are protected, but this works very little injury, for as a general rule books of this class, before the first edition is exhausted, or directly after the first rush is over, sink, together with their authors, into eternal oblivion. H.

The following extracts are given in further illustration of the subject discussed in the preceding article. The first is taken from *Coleridge's "Guesses at Truth;"* and the last from a writer who has recently made his appearance

under the cognomen of "*Inigo Jones*." There is no reason to believe that either of these authors intended to borrow from the other, and yet there is a surprising agreement in their views. Both unite in tracing ideas up to their antecedents, and in considering the last idea in the train as the necessary result of pre-existing impressions, and therefore less meritorious than the previous knowledge or thoughts which originated and forced into existence the last.

"How few of our best and wisest, and even of our newest thoughts, do really and wholly originate in ourselves,—how few of them are voluntary, or at least intentional. Take away all that has been suggested or improved by the hints and remarks of others,—all that has fallen from us accidentally, all that has been struck out by collision, all that has been prompted by a sudden impulse, or has occurred to us when least looking for it—and the remainder, which alone can be claimed as the fruit of our thought and study, will in every man form a small portion of his store, and in most men will be little worth preserving. We can no more make thoughts than seeds. How absurd then, for a man to call himself a poet or *maker*! The ablest writer is a gardener first, and then a cook."—*Coleridge*.

The thing that hath been is that which shall be; and that which is done is that which shall be done; and *there is no new thing under the sun*. Is there any thing whereof it may be said *see! this is new? it hath been already of old time, which was before us*. There is no remembrance of former things; neither shall there be any remembrance of things that are to come with those that shall come after. *Ecclesiastes ch. 1, v. 9, 10, 11.*

"The thoughts of the ancients and moderns often run into each other, forming new and beautiful combinations, like the blended colors of the rainbow. It is no argument against the originality of a discovery, or a conception, that it is a superstructure resting upon the rough foundations of antiquity. Nor does it detract from its merit that its capital decorations bear some traces of the Ionic volute or the Corinthian acanthus.—The thoughts of two cultivated minds will occasionally run spontaneously in the same channel, without either copying from the other. This is as natural and as common as the flow of two converging streams along the same water course, after being conducted to the same point by the previous progress of each. The same sensations, derived from similar ex-

ternal objects, would naturally produce the same train of reflections in two minds equally vigorous and cultivated, varying, it is true, in some respects, according to an interminable difference in mental constitutions, but still, like the multiform leaves of the sassafras, in essence and odor the same.

The discoveries, or thoughts, thus produced, are original with each; but by reason of the new thought or discovery being so interwoven with, depending upon, and, in truth, produced by thoughts which had been known before, it is insusceptible of exclusive ownership, without, to some extent, depriving the public of the benefit justly arising from the accumulated knowledge of ages. And, what is more, an exclusive property of this kind deprives a subsequent discoverer or inventor, equally original and meritorious, of the benefit of similar results of his own mental operations. Priority in the conception of a thought gives no moral claim to exclusive property against one who, at a subsequent period, worked out the same problem for himself. Primogeniture sometimes gives title to exclusive inheritance, but this is only the creation of legal policy, and rests not upon any principle of substantial justice. The Copy Right and Patent Laws are the shackles of genius, created by legislative policy, and stand not in harmony either with pure morality or with the laws of Nature.

If a moral right to exclusive property in new thoughts or new inventions exist at all, it is unlimited in its duration, and without restriction in respect to the terms upon which their benefits are to be extended to the public. The inventor of printing might forever have restrained the Liberty of the Press, and arrested the progress of those free principles of which it is the admitted palladium. Dr. JENNER might let loose upon society, unchecked by Vaccination, one of the most dreadful pestilences that ever destroyed mankind. And even the representatives of the Apostles might lay claim to exclude the creatures of God from the saving truths of his Holy Gospel."—*Inigo Jones*.

THE STATUTE OF LIMITATIONS IN PERSONAL ACTIONS.

The construction of this statute in England and in Pennsylvania has run into great confusion, and time, instead of harmonizing the decisions of Courts upon the subject, seems to have added to their discrepancies.—The writer of the essay in a late number of the “Law Journal” has not pointed out any remedy for the existing evils. The following suggestions are tendered to the profession, for what they are worth.

By the terms of the English Statute, as well as of our own, actions on the case, &c. “shall be brought within six years next after the cause of such actions or suit accrued, and not after.” This cuts off the right to bring or sustain an action, after the lapse of six years from the date of the cause of such action, whether the claim has been satisfied or not. The lapse of time mentioned, is *ipso facto*, a legal bar to a recovery. Whether the bar to the recovery is interposed on the presumption of payment: the supposed loss of evidence: or to suppress litigation and promote repose, is unimportant. The terms of the act are positive; and aside from extrinsic circumstances, are not subject to construction. So far, all authorities agree. It is plain, that the bar only applies to the remedy for enforcing payment. In conscience, the indebtedness remains. The benefit of the act was designed for the debtor, and it was left to his option, whether to take advantage of it or not. Tho’ it is a public statute, and the general rule is, that courts are bound to take notice of such statutes, without their being specially pleaded, after many conflicting adjudications, the practice seems now to be settled, that to have the advantage of the statute, the de-

fendant must plead it. If he omit to plead it, it is a waiver of record, of any benefit from it. And his cause is to be tried, as if the Act had never been passed.

The books abound with cases in which the courts have strove, by a forced construction, to prevent the operation of the statutes of limitation from doing injustice between parties. Although it may be hard to cut off a remedy by positive statute where a claim is indisputable, the attempts to reach justice through false theories and fancied equities, have fully demonstrated the wisdom of the act and the injustice of evading its provisions by what was designed to be a liberal construction of it. The best judges have deplored the error, and the attempt now is here, and in England, to bring back the act to its original integrity. But false theories, vicious decisions, and conflicting authorities, render the task a difficult one. The whole doctrine is marred with inconsistencies. The question involved is, where an action is brought, after the lapse of six years from the time the cause of action accrued, and the statute is pleaded; how may it be overcome by the plaintiff? We suggest that the only way it can be got over is by establishing a *waiver* of its benefits by the debtor. The statute was made exclusively for the benefit of the defendant: and it was left exclusively to his option, whether he would assume it as a defence or not. If he do not plead it, that is of itself a waiver. He may waive it by matter *in pais*. He may make such waiver either by express promise, or it may be established by implication. And we suggest further that such waiver is equally efficacious, whether it be done upon a legal consideration or voluntarily. If this is so, all the difficulties in which the subject has been involved, are dissipated.—The vexed inquiries, whether an acknowledgment revives the old debt; or is evidence of a new promise; whether the acknowledgment brings down the first prom-

ise to the date of the acknowledgment ; whether it is made during the lapse of the six years, or after their expiration ; whether the new promise relied on, be *nudum pactum*, or made on legal consideration, we think is unimportant. The question is, (the defendant having the whole power over the matter)—has he *waived* his right ? If he has, directly or indirectly, being for the benefit of the other party, the assent of that other party is implied.

It is an elementary principle of the law, "that one upon whom the law confers a benefit, may relinquish it, provided, that by doing so, he inflicts no injury on the rights of others" 5 Bar. Rep. 106. "There is no policy or principle which forbids a postponement by parol, of the legal operation of the statute of limitations, upon a lien once commenced." *ib.* 107. A parol agreement not to plead the statute of limitations is good. 15 Wend. 310, 5 Bar. Rep. 286. Numerous cases are put in the books referred to, where a voluntary relinquishment of such right is valid ; an omission to plead the statute, is but a voluntary waiver of defendant's right. The plaintiff's right is one thing, the defendant's another. The defendant may acknowledge in the clearest terms the whole of the plaintiff's right, the existence of the debt, its non payment, and the obligation of the defendant to pay it. But if at the same time, he declares his intention to rely upon the statute for his defence, the law can imply no waiver, and the plaintiff would be barred of his action, 2 W. & S. 137, 3 Wend. 187. This shows that the pith of the inquiry is, did the defendant *waive* his right ? I am well aware that courts have viewed this subject very differently.—They have spoken of it as requiring a promise upon legal consideration to stay the operation of the act : that a new promise draws down the old promise to the period of the latter date ; that the new promise revives the old ; that the old is the consideration for the new, and that a prom-

ise, which will revive the old debt, must have a sufficient consideration, &c. It is not readily discovered how these doctrines can be maintained, or how they can lead to the conclusions drawn from them. It is said that two obligations cannot exist on the same consideration at the common law, 5 Bar. Rep. 228, "giving independant remedies to enforce the same duty," Do. 227. If one promise is rendered inoperative by lapse of time under the statute and another promise is made to pay the same debt, founded on a valid consideration, then the last would be the only existing promise on which suit could be brought; but our courts sustain the action on the first promise, although by the doctrine in 5 Barr there would be a second promise in force which had superseded the first. In *Magee v. Magee* 10 W. 172, the precise point occurred, and the action was sustained on the old promise, the court taking no notice of the second. So, in numerous cases, it has been decided and taken for granted that a promise after suit brought, will sustain an action commenced on a promise barred by the statute, 2 Burr. 1090, 9 W. 380, 2 W. & S. 138. It is a rule of universal application that the cause of action must exist at the commencement of the suit. But by the positive terms of the act of limitations, no such suit can be brought on a promise after the lapse of six years. But suppose such action to be brought the defendant pleads this act in bar of the action. He is defeated in his plea by a promise made after suit brought. This result might legally occur, if the action be brought on the original promise, did either before or after the commencement of such suit the debt. waive his rights under the statute. But the only legal ground of recovery as such case must be, the putting of the statute out of the way; and this can only be done by the defendant waiving his right. The plaintiff cannot change his cause of action after suit brought, so as to sustain his suit. If a debtor

declares to his creditor, that he owes the debt and will pay it, does that not justify the inference, that he waives his legal defence growing out of the statute? There are various ways in which a debtor may waive the operation of the statute by implication. He may not plead it; he may make payment of a part and have it endorsed on the evidence of debt; there may be current or mutual accounts kept up between the parties, &c. These, and any other transactions, which conclusively show, that the defendant relinquishes his defence under the statute, justify the inference that he has waived his right. This is resorting to a plain and practical principle and secures the end in view.

I cannot comprehend the legal notion, so often asserted, "that an acknowledgment, either revives the debt, or affords a circumstance from which a new promise may be implied, or "that the one promise draws after it another, so as to have the effect of evading the statute of limitations. 5 Bin. Rep. 577. The doctrine certainly wants legal precision. In the first place there is nothing to be revived. The indebtedness continues after the lapse of six years; and the promise to pay it is not extinguished; for the creditor's cause of action remains, and he may bring his suit upon it and recover, unless the *debtor* take shelter behind the statute. The promise must therefore continue, if it affords a legal cause of action. But suppose the old promise is revived by the new acknowledgment, it is then placed upon its original ground; and still an action upon it would be barred. To acknowledge that a contract exists and will be performed, is no evidence of another contract, nor is it any alteration of the first; he leaves the first exactly on its original position, reaffirmed by the acknowledgment. Suppose there be a new promise to pay, made upon sufficient consideration. That being a legal promise, it might be enforced

by an action directly upon it. But how could such new contract evade the provisions of the act, if suit be brought on the old promise? The suit would not be brought within six years next after the cause of action accrued. The suit would be upon the original cause of action, and it would be over six years; the defendant would plead the statute in bar of the action and would insist upon the positive terms of the act, and that they could not be construed away. My argument is, that in such case the plaintiff could not repair his cause of action by the subsequent promise, whether made before or after suit brought, but that the defendant might waive his defence. That the subsequent promise does not remodel a plaintiff's cause of action, but defeats the defendant's defence. The cause of action needs no assistance—the original promise is enough. The second acknowledgement or promise, may be good evidence that the first was made. The statute does not abrogate it. The plaintiff might have his election in such case to sue upon the first or upon the second promise, where the second is a legal one. The remark in 5 Bar. Rep. "that two obligations cannot exist on the same consideration," would not control this right. There are many cases where remedies are cumulative, as where a creditor, having a book account against his debtor, takes a promissory note to secure the payment of it. He has his election to sue on the book account, or upon the note. 5 Bar. 228. I admit, that the mere acknowledgment of indebtedness is no waiver of the statute though this has been variously decided. For, by its provisions, if the defendant choose to rely on them, it is unimportant whether the debt is paid or not. He cannot be put to the test of a trial upon the merits. It is not with the plaintiff's cause of action the defendant has to do; that he does not undertake to controvert. But if the plaintiff undertook to recover over the statute of

limitations when pleaded, he must establish affirmatively, that the defendant has waived the benefits of it, and the fact of waiver would be the subject of common law proof. It differs only from a contract in this, that the one requires a consideration to be proved, the other requires the proof of no other consideration than is indicated in the act of waiver. An executor or administrator may waive the operation of the statute by omitting to plead it, but as he acts only in a representative capacity, and in relation only to the rights that were vested in the testator or intestate, he cannot by a new agreement waive such right on behalf of the estate he represents. An agreement to that effect would require all the ingredients of a contract, and would be his own personal act, and would not be binding on the estate. 1 Whart. 66. This, too, has been otherwise held.

If "a promise by the debtor before the statute has completed the bar" is sufficient to evade the operation of the statute on the ground that "it might be injurious to the creditor" as indicated in 5 Bar. 229, then, a promise to pay the debt, or any other act on the part of the debtor, evincing his determination not to rely upon the statute, for like reasons would be a waiver of his right. The nearness or remoteness of the dangers of injury could not be made the test of its being, or not being, a legal consideration for a promise, as seems to be indicated in the case referred to.

This question has been equally tortured by decisions in most of the other states. The case of *Pinkerton vs. Bailey*, 8 Wend. 600, affords a useful illustration. An action was brought upon a *promissory note*, after it was barred by the statute, a subsequent parol acknowledgment, was held to "keep alive" or "revive the remedy." This seems to me, to partake more of Judicial magic than of "the perfection of reason." If it be considered

as a waiver of the statute, it is intelligible ; but how it can animate a promissory note of some ten years standing with all its mercantile incidents, and yet protect it from the operation of the statute as a note under six years old is not so readily perceived. 9 Wend. 293.

The doctrine in Massachusetts is, that the acknowledgment of the debt by the defendant, within six years, shows that "the contract is not within the *intent* of the statute." viii. Mass. Rep. 133, xi. do 452.

There is no subject upon which there has been so many conflicting opinions as that of the statute of limitations. The books are full of these, and present indications are unfavorable to the hope of the courts arriving at any thing like uniformity. This demonstrates that false theories have been assumed, and ungarded speculations indulged, from which contradictory and illegal decisions must have necessarily followed.



PINTARD ET AL. IMPLEADED &c. v. DAVIS.

Court of Errors and Appeals of New Jersey. October Term, 1846.

1. One of two or more co-obligors in a money bond cannot at law aver that he is only a surety.

2. A surety is not discharged by requesting the creditor to sue the principal debtor while still solvent, though the creditor neglects to sue, and the debtor afterwards becomes insolvent.

3. A surety cannot by notice *in pais* compel the creditor to sue the principal.

Error to the Supreme Court. This was an action of debt brought in the Monmouth Circuit Court by Davis

against Pintard and two others who were impleaded with one Morford, upon a joint bond, dated June 9, 1829, given by the plaintiffs in error and the said Morford to Davis in the penal sum of \$800, conditioned to pay \$400 in one year from date. The declaration was in the usual form. The defendants (except Morford) pleaded specially that the action ought not to be maintained against them, because Morford signed the bond as principal and they as sureties only, and that the bond was given for the proper debt of Morford, of which the plaintiff had notice at the date of the bond. That after the bond became due, to wit: in 1833 they requested the plaintiff to collect the money of Morford who was then solvent, and so continued for eight years thereafter, and that the same could then have been collected of him, but that the plaintiff without reasonable excuse neglected to take any legal measures against him or to proceed in any way to collect the same. That Morford became insolvent and so continues, so that by the neglect of the plaintiff the loss will fall on his sureties if they should be compelled to pay the debt.

To this plea the plaintiff demurred, and the Circuit Court held the plea to be insufficient. The judgment of the Circuit Court was affirmed on Error in the Supreme Court, (Spencer's Rep. 205) and thereupon a writ of error was brought to this Court.

Mr. WALL & Mr. VROOM for plaintiff in error: In equity the surety may compel the creditor to collect the debt and any thing done by the principal to injure the surety, as by giving time or changing the character of his liability, discharges the surety. But the surety is not obliged to resort to a court of equity to stimulate the diligence of the creditor. Although it may be admitted that it is still otherwise in England, yet here we are not so strictly bound by the forms of the common law, and re-

lief may be had in many cases at law. Whether a surety is discharged or not is a legal question. Mere laches may not discharge a surety, but if injury occur in consequence of delay after notice, as in case of subsequent insolvency of the principal, then the surety is discharged. 1 Bra. C. C. 582 ; 2 Ves. Jr. 540 ; 4 Dal. 135 ; 8 S. & R. 110 ; 7 John. 332 ; 13 Ib. 174 ; 15 Ib. 433 ; 17 Ib. 384 ; 1 Hill (S. C.) Rep. 16 ; 3 Wend. 216 ; 13 Ib. 377 ; 10 Ib. 162 ; 3 Wash. C. C. R. 70, 75.

Mr. Vredenburg & Mr. Dayton contra cited 6 Ves. 734 ; 2 John. Ch. R. 554 ; 2 Pick. 581 ; 4 Ib. 382 ; 5 Ib. 307 ; 2 South. 585.

CARPENTER, J. Whether a surety is discharged or not may be a legal question, but in the case of a sealed contract it must be when the suretyship appears on the face of the instrument. The solemnity of such instruments forecloses in general all inquiry into the consideration.— If bound as principal a defendant cannot aver at law that he is only a surety, though in equity parol evidence is admissible to show who is principal, and who surety. In this state this clear rule of the common law has never been infringed. In *Manning v. Shotwell*, 2 South. 584, the creditor who had been called upon to sue the principal discontinued the suit and gave him further time. The court held that this did not form any defence at law to a suit against the makers of a sealed bill.

But independent of this technical objection, which however is fatal to the legality of the plea, the defence cannot be maintained. The undertaking of such surety is absolute. It is his business to see whether the principal pays and not that of the creditor. If he lies by and the insolvency of the principal intervenes, he must abide by the loss and cannot throw it on the creditor. Mere delay to require payment, without any binding contract for that purpose and without fraud, will not discharge a surety,

and upon the facts of this plea there could be no relief even in chancery. Supposing the surety can call upon the creditor to do the most he can for his benefit, it must be upon terms that will secure the creditor from all the consequences of risk, delay or expense. *Wright v. Simpson*, 6 Ves. 734 ; 2 Story Eq. T. § 849. But no sanction has ever been given in this state to the present attempt to invert the natural order of the obligations created by the contract of surety. The cases of *Pain v. Packard*, 13 John. 174, and *King v. Baldwin*, 17 Ib. 384, are not generally recognized as authority and have introduced into the state in which they were decided a new rule between creditor and surety which we think unnecessary and inexpedient. The surety has ample means of relief more in accordance with the nature of his contract. He may compel in a Court of equity the payment of the debt, or a more obvious and simple course, he may pay the debt himself according to his undertaking, and then sue the principal upon his implied contract for re-imbusement. The present case is one of mere delay, and we do not recognise the rule that the surety by a simple demand *in pais* can remove the duty of active diligence from himself to the creditor. We are all of opinion that the judgment of the Supreme Court must be affirmed.

The Court (the chancellor, Whitehead, Carpenter, Randolph, Speer, Spencer, Porter, Schenck, Robinson & Sinickson,) unanimously affirmed the judgment of the Supreme Court.

HORNBLOWER, C. J. and NEVINS, J. did not sit on the argument of the cause.

Supreme Court of Pennsylvania.

MIDDLE DISTRICT.

Hack et al. v. Stewart.—A father being indebted, cannot sell his real estate to his sons, allowing a part of the consideration to be retained by one of them for services rendered after he became 21 years of age in his father's family. Such sales and conveyances would inevitably lead to fraud. Burnside, J. Error to Perry Co.

Storble v. Cleaver.—The plaintiff in an elder judgment, on a sale of the land of the defendant on a junior judgment, is not bound to come and take the money; and if the Sheriff distributes the money without paying his lien, and the money goes to the case of the defendant by paying his other debts, the elder judgment will still be good against the defendant, though its lien is discharged. Per Coulter, J. Error to Berks Co.

Judgment affirmed.

Faust v. Miller & Renno.—When the attesting witnesses to a bond saw but one of the two obligors sign and seal, the jury ought to have been instructed to inquire whether the form of the clause of attestation was purposely made general by the contrivance of the obligee to import an attestation of execution by both obligors, or whether it was done ignorantly and accidentally. If the witness subscribed it as it was prepared, without being practiced upon by the obligee, the bond was valid. The question of the honesty of the transaction should have been left to the jury. Per Gibson, C. J. Error to Berks Co.

Judgment reversed and venire de novo awarded.

McAlister v. Boden.—The mechanics' lien law of 1845, does not extend beyond the master workmen, and is not to be construed to include journeymen and day laborers. Per Bell, J. Error to Dauphin Co.

Judgment reversed.

Brice v. Clark. A justice of the peace having issued an Execution against Liggit, Brier came in to the justice and "acknowledge himself as bail to be paid at the expiration of six months," which the justice took upon his docket. Assumpsit was brought against Brier. Held, that the promise and undertaking was not merged, as this is not a recognizance authorized under the Act of 12 July, 1842. It is a promise on forbearance which is sufficient to support the assumpsit. Per. Burnside, J. Error to Juniata Co.

Judgment affirmed.

Cobel's Ex'rs. v. Cobel.—Where a landlord assumed to take part of the crop for the use of the land, and died before the harvest, his share of the grain was held to be rent, and to go with the reversion to the devisee, and not to the Executor. Per Coulter, J. Error to Franklin Co.

Judgment affirmed.

Ekel v. Jones.—Jones was sued on a guaranty in these words: "I guaranty the payment of John Smull's notes payable to John Ekel." The notes offered in evidence were Smull's notes payable to the order of John Snevily, and transferred by Snevily to Ekel. It was objected that the guaranty does not refer to the notes offered in evidence—the notes offered being notes payable by Smull to Snevily and the guaranty of notes payable by Smull to John Ekel, and the offer was rejected by the court. This was held to be error—that the question should have been submitted to the jury as a matter of fact. Per Coulter, J. Error to Dauphin Co.

Judgment reversed.

Hart & Co's. Appeal. Hart's judgment was entered in the Common Pleas of Lycoming on the 24th June, 1839, and never revived. Clinton county was erected on the 21st of June, 1839, but not organized till some time afterwards. The judgment was well entered in Lycoming, and the lien for five years in Clinton would hold, but not longer without a sci. fa. to revive even though execution was issued upon it. Per Rogers, J.

Decree affirmed for the reasons given by Judge Woodward.

Keller's Appeal.—An admr. who does not give new and original credit to a debtor, but found the bond among the papers of the decedent, when it had been due four months before the decedent's death; and no change of circumstances or new posture occurred in the affairs of the obligor to put the admr. upon close vigilance, and his credit had remained good in the neighborhood till his failure, and where some payments on the bond had been made in the mean time; the admr. is not to be held accountable.

Admrs. are required to act only with honesty and good faith, and are not required to possess greater foresight than others around them.

There is a distinction between this case, and one where the admr. has the money in his hands and lends it out.—In the latter he will be held to rigid accountability; in the former the confidence is already reposed by the decedent, and such vigilance only is required as a prudent man would be expected to possess.

Gross negligence is required to charge a trustee. Per Coulter, J. Error to Cumberland Co.

Decree reversed.

Mantland v. Himes.—The release of one who is surety in a joint judgment does not release the principal. Per Bell, J. Error to Cumberland Co.

Judgment affirmed.

Armstrong v. Nevinger.—The 12 sec. of the Act of 21 March, 1772 (landlord and tenant law) commands the Sheriff to *summon* twelve substantial freeholders. This necessarily implies that he must *select* as well as summon, which is in its nature a judicial act, and cannot be done by deputing a stranger. It must be done by himself or his deputy acting under the sanction of an official oath. Nor does the subsequent assent of the Sheriff cure this radical defect. Per Rogers, J. Error to Dauphin Co.

Miller v. the Comth.—The day of the date of a bond given by a collector and his sureties conditioned for the faithful performance of his official duties is to be *included* in the computation of time during which the bond is to run so as to hold his sureties for moneys received by him on that day. Per Burnside, J. Error to Dauphin.

Hale v. Grady. Where a justice of the peace issued a summons, the deft. appeared and confessed judgment for a sum *beyond the jurisdiction of the justice*, entered bail for stay of execution, and afterwards paid the money to the justice, the bail of the justice will be liable to the plttf. on his bond and the Act of Assembly requiring it. Per Burnside, J. Error to Dauphin Co.

Judgment affirmed.

Sunbury v. Dauphin.—Though the Act of 1836 declares the order of the sessions (relative to the settlement of a pauper) shall be final, yet it does no more than would have been done had the clause been omitted. Neither that Act, nor the English stat. on the same subject, attempted to take away the common law jurisdiction of this court to examine into the legality of the order on certiorari.

Payment of rent by a surety is payment by the principal within the intent of the poor law, though not at the

instance and request of the principal. The legal obligation of the surety would supply the place of such request, and enable him to recover, for money paid and expended from the principal. Per Curiam.

Judgment affirmed.

Dohner v. Dohner.—The 3d section of the Bankrupt law divests the property and right of property of every name or nature, whether real, personal or mixed, of every Bankrupt by mere operation of law *ipso facto*, from the time of the decree, and by virtue thereof vests it in the assignee. The testator who bequeathed the legacy in question, died the 4th of May, 1845; the plttf. was declared a bankrupt the 20th May, 1845. He has therefore an interest in the legacy. Per Rogers, J. Error to Lebanon Co.

Judgment affirmed. Marked not to be reported.

Holm's Appeal.—When the lien of a judgment expired after the sale of the land by the administrator and while the money was in his hands; held, to be unnecessary that it should have been revived to continue its lien on the money. Comth v. Glinn, 3 P. R. Per Curiam.—Error to Lebanon Co.

Judgment affirmed. Marked not to be reported.

Kamony et. al. Appeal.—When execution issued before the judgment was ripe, subsequent execution creditors cannot take advantage of it. Per Curiam. Error to Lebanon. Judgment affirmed.

Lantz v. Lutz.—The Act of 1819 which allows the attorney general to enter a nolle prosequi on an indictment for fornication and bastardy on a compromise, recognizes a private right in the prosecutrix, which entitles her to have an action against the constable on an escape of the pu-

tative father from him after an arrest on a warrant, notwithstanding the 7th sec. of the act of 1772 which limits the period of bringing certain actions against justices and constables to six months from the time of the recovery.

The design of this Act (1772) is to defend the officer against the consequences of involuntary trespasses, not against the consequences of wilful misconduct. Per Gibson, C. J. Error to Lebanon Co.

Judgment affirmed.

Canal Commissioners v. Commonwealth.—When a man is appointed to an office created by the Legislature, for a definite period, with compensation fixed by law, the legislature may after he has entered upon the duties of that office, lessen the compensation so fixed, without violating the constitutional provision against *impairing contracts*. Per Curiam. Error to Dauphin.

Judgment affirmed.

Shornberger v. Mulholland & Lyon.—The Act of the 5th of May, 1832, regulating lateral rail roads is constitutional and wise; and by the Act of 28 March, 1840 it is extended to all the counties of the State. The Act of 12 Feb. 1842 is merely accumulative to the counties of Tioga, and Columbia, and does not repeal the Act of 1832, and has no relation to the other counties of the State.

Possession and occupation of the mines and lands adjacent, are sufficient, under the Act of 1832 to give the right to such a lateral rail road, without the legal title being proved. Per Burnside, J. Error to Blair Co.

Judgment affirmed.

F. & M. Bank for use of Eccles v. Harper & Miller.—The bail in a recognizance for a writ of error who is fixed, may on payment of the cost take a transfer from the plff. and proceed to make them by Execution from one of the

co-defendants unless there be collusion between him and the insolvent co-defendant, in which case it would be otherwise.

The bail being compelled to pay the costs had a right to take a transfer as an indemnity ; and this whether the action be tort or contract. *Per Rogers, J.* Error to Cumberland Co.

Elter v. Baily.—Where a deft. in a judgment passed over to the agent of the plttf. either as collateral security or satisfaction of the debt, a quantity of stoves, and the agent sold them either on his own account, or for the plttf. the debt was so far discharged, and the defendant in the judgment is a competent witness in regard thereto.

The sale or barter of the stoves by the agent was a direct conversion of them which supercedes the necessity of demand and refusal, which is merely evidence of it.

Nor was the agent entitled to storage in the suit against him, having forfeited his right to retain, by having dealt with the property as his own.

And though the note was originally in the names of Baily and Updegrave, yet the delivery of the stoves to Baily alone, through his agent the deft. in this suit, gave him separately a special property in them, sufficient to maintain an action in his own name against a wrong doer. *Per Curiam.* Error to Dauphin.

Judgment affirmed.

Bratler's Appeal.—The lien of a mortgage given for the purchase money of land is not divested by a sale on a judgment entered on the same day on which the mortgage was registered, when it was entered for recording within the sixty days. The proceeds of the sale will go to the extinguishment of the liens entered while the deft. and mortgagor had only the equitable title. *Per Bell, J.* Error to Mifflin Co.

Decree affirmed.

Ege v. Barnitz.—The assignor of a bond with guaranty, afterwards requesting the holder “not to put the bond in suit at this time as it is my desire not to have an action brought on said bond,” thereby waives his right to have care and diligence exercised on the part of the assignee, and in case of loss the assignor will have to bear it, on the same principle that the giving of time to a principal will discharge a surety.

This waiver cannot be annulled by after instructions to sue when the obligee had left the State.

Nor is an assignee obliged to look to collateral security given him by the assignor, after the assignment and guaranty, before suing the guarantor. It formed no part of the original contract. Especially is this so, when the collateral is subject of agreement without the intervention of the assignee, and its recovery is uncertain. *Per Coulter, J.*

Judgment affirmed.

Cox v. Couch.—Where a tract of Land is described in the articles of agreement for sale, by calls for adjoiners, but not by courses and distances at all; and in the deed the grantor added courses and distances, one of which varying from the line on the ground, assumed to carry the grant into the land of an adjoiner, the vendee cannot insist that the vendor had not title to all the land he professed to convey, when he had title to all he sold and was to be paid for. The consequences would have been the same had the course and distance fallen short of the actual boundary.

It is a principle of construction that where lands are described by courses and distances, and also by calls for adjoiners, the latter, where there is a discrepancy, universally govern. By reason of the imperfection of instruments, the inequalities of surface, and carelessness,

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extreme accuracy is not to be attained by the compass and chain, while calls for natural objects, or what is much the same, known and established lines of contiguous tracts, admit of perfect certainty.

Where therefore a vendor conveys by established land marks, the subject of the grant will neither overrun nor fall short of them. They form the true boundary, and the courses and distances serve but to point towards the plan. Per Gibson, C. J. Error to Huntingdon.

Commonwealth. ex. re. Philipi v. the Judges of Quarter Sessions of Lebanon. Mandamus.

An act of the legislature directing an election to be held within the townships interested, by the qualified voters, in order to determine by ballot whether the new township should be continued or annulled, is not within the principle settled in *Parke v. the Comth. (6 Bar.)* but is constitutional and valid.

“That case settled nothing more than that the General Assembly cannot delegate to the people a power to enact laws by the exercise of the ballot, affecting the property and binding the political and social rights of the citizen. But the creation of a new township, or the erection of a new district for merely municipal purposes or convenience for the transaction of the public business, is in no degree similar to the execution of the law making powers.” “By the Act of 1834 the courts acting through commissioners are vested with the power to erect new townships and divide old ones, and the constitutionality of that Act has not been questioned. But if the Legislature can authorize the courts to decide questions of this character, they can authorize the people primarily to do so.”

The mandamus in this case, which was to direct the swearing in of a constable elected in the new township, discharged. Per Bell, J.

Sneily v. Wagoner.—On a partition in the Orphans' Court, where the husband of one of the heirs takes a part more than his wife's portion, he will be regarded as a purchaser and taking in fee simple such excess, and as having only a life estate in what would have been her portion. Per Coulter J. Error to Lebanon county.

Judgment affirmed.

Light admr. of Peffley v. Leininger.—By our defalcation act, and by the principles of Equity, mutual demands of persons dealing together, mutually pay and satisfy each other, so that on the oath of one of the persons so dealing, his admr. cannot regard the whole claim of his decedent as assets, and he can recover only the balance which may be due. Per Coulter J. Error to Lebanon county.

Moore v. the Comth.—A person paying out the note of a broken bank and taking a receipt in discharge of a debt is not indictable under the 21 sec. of the Act of 12 April, 1842. Such a receipt is not *money, personal property* or other *valuable thing*; for as a receipt can be explained or avoided for misrepresentation in law or equity, it will not prevent the recovery of the just debt. Per Burnside, J. Error to Quarter Sessions of Cumberland Co.

Judgment reversed.

Piper v. Martin.—Where a Pltff. in an Execution at the Sheriff's sale bid off property attached to the freehold with the consent of the deft. in the execution, he will be bound to pay for it, though his judgt. and execution are subsequently set aside, and the money ordered to be paid to subsequent executions which were not issued at the time of the sale. The rule *caviat emptor* applies. But in this case the pltff. was a party to an agreement to consider the money in Court, when the decree of distribution was made, and Martin the pltff. had actually paid

it according to that decree. Judgments on the real estate are not interested, because the property (a still) is remaining ; besides they are bound by the decree.

The assignees in Bankruptcy of the deft. in the execution were likewise parties to the decree of distribution, and if they were not, the Sheriff is the proper party to recover the money. Per Rogers, J. Error to Cumberland Co.

Judgment affirmed.

Kinzer v. Mitchell.—The deft. in an ejectment may prove by parol that the judgt. of the plttf. and the sale of the land to him were procured by fraud ; that the proceedings in the Orphans' court to have the land sold for the payment of debts, were not in reality a sale, but a mode of partition adopted by the heirs for convenience ; that Mitchell the husband of deft. never paid anything for the purpart of the land in controversy, but held as trustee of the wife, the deft.; and that Mitchell after quarrelling with his wife only set up absolute title in himself and confessed the judgt. to the plttf. on which he purchased the property, but never paid any money, and had notice of the fraud. Per Coulter, J. Error to District court of of Lancaster.

Reaffirms the opinion in the same case, 5 Barr 216.

Judgment affirmed.

Davis v. Norris.—A judgment in partition charging the purpart of the plttf. with owelty, is not a judgment quod recuperet, and will not sustain a sci. fa. reciting that the plttfs. had recovered against the plttf. in partition as well a certain debt of so much, as well as so much for their damages and costs. The plea of nul. tiel record in such a case ought to have been sustained. There is no such judgment on the record.

The statute authorized nothing to be added to the judgment in partition which is *quod partitio firma et stabilis in perpetuam teneatur*. It charges the owelty of partition awarded by an inquest on the purparts; proprio vigore; and the process to enforce it, is like that under a certificate of balance attached to a verdict for debt. pursuant to the defalcation act. The writ ought simply to recite the impleading, the interlocutory judgt. the award of an inquest, the inquisition and the final judgt. with an averment that the debt. had not paid, &c. Per Gibson, C. J. Error to Mifflin Co.

McGuire admr. of Adams v. Adams.—Pltff. claimed for board and attendance on the intestate and funeral expenses. Debt. set up a note held by the intestate against the pltff. about which proof was given that the intestate said in the life time she would never collect it of him; and that at her death it was to be his.

Per Curiam. The case of *Zeigler v. Eckert* (Law J. 1847 Aug. No.) on which the case was ruled below belonged to a distinct class. There the parol evidence was admitted to rebut a presumption that a testator did not intend to give by his will, not as proof of an independent gift. This case is decided in the case of *Duncan Campbell's estate* at the last Term at Pittsburg, in which it was held that directions to destroy certain promissory notes, or give them to the drawer in case the creditor should die before seeing him, are but evidence of an unexecuted intention to give, not a gift itself. That case rules the present. Error to Adams Co.

Judgment Reversed and venire de novo awarded.

Miller v. Ege.—A. a manager of a furnace belonging to the Estate of his deceased father, which estate was indebted to him both as manager and devisee, owed a debt

to B. on which he was arrested on a ca. sa. C. executrix of the will who had powers conferred in it to carry on the furnace and manage the estate, confessed a judgment to B. in place of, and in satisfaction of his claim against A. Held, that such a judgment was an exception to the general rule, that an Adm'r. Executor or Trustee, cannot bind the estate held in trust for the benefit of himself or for the debt of a third person, and that such judgment could bind the estate. Per Rogers, J. Error to Cumberland.

Decree Reversed.

Benson v. Borough of Reading.—The court of Quarter Sessions of Berks Co. under the general road law has no authority to *widen* Liberty alley into a 50 feet street, nor under the Act of 1825, 6 P. L. 115, sec. 2, 3 and 4, for the better regulation of the borough of Reading, which authorized the court to grant views for opening or extending any street lane or alley in said borough, any such powers. Per Curiam.

Decree affirmed for reasons given by the Court below.

Hood v. Palm, et al.—The declaration in this case charged a *conspiracy* to defame the plttf. by speaking scandalous words of him, and evidence was given of words as overt acts which would not be actionable if spoken without preconcert, and also of a written publication of the same words which were distinctly libellous. Held, that a legal presumption of damage arises, though no special damages is laid or proved.

A Conspiracy to defame by spoken words not actionable would be subject to prosecution by indictment, and if so by action, by reason of the presumption that injury and damage would be produced by the combination of numbers. Per Gibson, C. J. Error to Cumberland Co.

Contk. for use v. McIntyre Garnishee.—When the real estate of an intestate is valued and appraised in the Orphans' Court and taken at the valuation by one or more of the heirs, and recognizances entered into to secure the shares of the other heirs, and afterwards such real estate is sold at sheriff's sale on incumbrances against the intestate for a less amount than the valuation, after the recognizances are due, and a balance, after paying all liens against the intestate, is paid over into the hands of the admr. such balance will go to the recognizees. But the recognizees cannot attach it in the hands of the admr. as garnishee, for the recognizers had no claim to it.

In this case the three sons, the recognizers, had the possession of the real estate for five years, and one of them had money belonging to the estate which ought to have been applied to the payment of the liens; hence it was their fault the property was sold. Per Rogers, J.—Error to Perry Co.

Welsh v. Cooper.—A person who indemnifies a Sheriff for selling the goods claimed by another person than the deft. in the execution is a party principal in the trespass, although not joined in the suit, so that he cannot be compelled to testify; but his declarations when against his interest may be proved.

The books of the person whose goods are thus sold ought also to have been received in evidence. They are not evidence *made* for him, more than that he sold goods, received the money &c. The weight of such testimony must be referred to the jury. Per Coulter, J. Error to Perry Co.

Judgment reversed.

Martin v. Hammond.—A plff. in suing for the purchase money is entitled to recover, without showing that the title is good, where he does not set out his title, upon

proof of a deed tendered. The deft. to put him upon proof of title must plead something more than covenants performed, to give him notice the title is contested. The usual mode is by the addition of *absque hoc*, &c. Per Coulter, J. Error to Cumberland Co.

Judgment affirmed.

Sanderson v. Haverstick.—A person who cuts timber and piles it up for use, in the lines of the plttf. upon ground in which a public road had been located by viewers, but actually opened a short distance from where the viewers laid it, is liable in Trover under the 3d sec. of the act of 29 March 1814. The cutting and piling is a sufficient conversion under this act.

When a public road passes over land, the timber and grass upon its surface, and minerals beneath it, belong to the original owner. The public acquire a right of way merely, subject to which the rights of the owner are unchanged. In this case the timber was cut by deft. to prevent its shading his meadow. Per Curiam. Error to Cumberland Co.

Affirmed for the reasons given by the Court below.

Comth. for use v. Magee Sheriff.—The order of a single judge of the Common Pleas, made at Chambers, and without previous notice to the plttf. in the execution, to stay proceedings on the writ, is obligatory on the Sheriff, and he can justify under it for not making a levy and sale. It postpones the execution till after the return day, so that intermediate executions will take the proceeds.

Notice in such cases is not indispensable though highly proper, but the Sheriff is not bound to enquire into the regularity of the proceeding.

In this case the judge made two errors, in acting *ex parte*, and in giving an unconditional order, without re-

gard to the rights of the plttf. Associate judges not versed in matters of law, should take warning. Per Pell, J. Error to Perry Co.

Judgment affirmed.

McFail's Appeal.—When a testator directed the devisee of her real estate to pay "all her legal debts due at the time of her decease," bonds not payable till some time after her death, are included.

On a devise "under condition" *ut supra* and in juxtaposition the personal property is given to another, not only the debts but legacies are charged on the land as the primary fund. Per Coulter, J. Error to Cumberland Co.

Judgment affirmed.

Sowers v. the Academy.—The purchaser at a Sheriff's sale is interested in the appropriation of the money raised by the sale, since the act of 1830, and is bound to come in at the return of the writ and attend to his particular interests, or he will be concluded by a decree of the court.

In this case a mortgage junior to the judgment on which the sale was made was not paid out of the fund.—The creditors and the purchaser, it is said, were the real parties interested, as the mortgagee had an unquestioned right to come upon the land or the fund. But the purchaser took no part, and so the mortgage was not paid out of the fund. The mortgagee can look to the land.—Per Gibson, C. J. Error to Juniata.

Judgment affirmed.

Moore v. Miller.—No form of words are necessary to constitute a lease, the term need not be used; any term equivalent will answer.

An agreement that the plttf. should enter, dig, ore, build houses, &c. to pay as a compensation fifty cents a ton for

the ore taken, is in substance a lease; and whether he was a tenant at will, or from year to year, is a question of fact to be determined from the whole evidence, and being by parol was properly left to the jury. *Secus* if the lease had been in writing, but there being evidence on both sides, the court was not bound to take it from the jury. It was only their province to instruct the jury what established a tenancy at will, &c.

In the absence of proof no implication arises in law that a lease is to hold from year to year for a year, or any definite period; but the jury must look to the whole proof in the case and determine from the evidence.

The court is not bound to withdraw a case from the jury at the request of either party where there is anything legitimately referable to them. When the evidence is clearly insufficient it is not error for the court so to instruct them, but it is error to withdraw when there was any thing which ought to have been left to them. *Per* Coulter, J. Error to Cumberland Co.

Judgment affirmed.

James Bredin's administratrix with notice to heirs of said deceased v. Agnew.—This was originally an action of covenant brought by John Agnew v. James Breden in his life time in 1834, which remained pending and undetermined. Bredin having died intestate in July 1838 and his administratrix having been substituted by consent until 1841, at which time judgment was entered in the court below for the plaintiff, which was affirmed by the Supreme Court, 6th February, 1843. On the 20th July, 1846 this *sci. fa.* was issued to revive the lien, &c. and with notice to the heirs in order to charge intestate's lands, which were in the possession of said heirs and situate in Perry county. The above facts were found by a special verdict. It is proper to state that the special verdict set forth a fraud-

ulent judgment obtained by John Bredin against James Bredin, which was to be considered or not by the court as they should or should not think the evidence pertinent to the cause. Very properly no notice is taken of this part of the evidence by the court above: Held, Bell, J. delivering the opinion, that the substitution of the administratrix, was a sufficient commencement of an action under the Act of 24th February, 1834, that the judgment was well revived under its various provisions so as to charge the lands, and that it bound the lands in Perry county, the lien of a judgment obtained after a decedent's death on a debt due before being only limited by the boundaries of the state, though suit can be brought in but one county. Error to Common Pleas of Cumberland Co. *Sci fa.*

McDowell et. ux. v. Adm'r. of Potter.—Upon the plea of the statute of limitations in an action by a client against his attorney to recover money collected by him, time must be computed from the period when notice was given to the client of the receipt of the money sued for, the onus of proving which falls upon the Attorney. Yet in case of a demand of long standing if with ordinary care and diligence the client might have known that the money had been collected, it would be otherwise.

Though a feme covert be within the saving clause of the Act of limitations, and protected from the effect of lapse of time, yet in a suit by the husband and wife the action is that of the husband, and in which the Act of limitation may be effectually pleaded. But if no action be brought during coverture the statute begins to run only from the period of discoveriture. Per Rogers, J. Error to Centre County.

Christman's Estate.—Where the words of a will were—
"I give and bequeath unto my son Jonathan five hundred pounds money as aforsd. and to my Daughter Reachel four hundred pounds Money as

aforsaid, but since both my son Jonathan and my Daughter Reachel are, nun Compas Mentis It is my will that their Shears shall remain in the hands of my herein after named Executor, at his own and proper use during their Lives, and for the use of the money of both those shears, my said Executor, shall pay Intrest at the rate five per Cent per hundred yearly, and shall Keep both Jonathan & Reachel, by himself and Cloath & feed them and shall give Jonathan yearly twenty dollars as wages, as Long as he is well but if he should get sick or trouble som he shall have a right to make a reasonable charge, and I give and bequeath unto my Daughter Sahra five hundred Pounds but as it is doubtfull with me wither she will ever be fit to act for herself it is my will that she shall be at the eage of twenty one years examined and if it will appear that she should not be possessed of understanding enough to govern her affairs, then her shear shall also remain with my executor in the same way as Jonathan and Reacheals shears are ordered by me to be appropriated, and if any of my before Mentioned Children should die without Issue, their shears shall be eaqually divided amog all the rest of my Children Excepting my son Peter he shall receive no part thereof.

Held: that Peter as trustee should have the uncontrolled and absolute use of the money bequeathed to the Legatees during their lives, and as a compensation therefor he should pay interest at the rate of 5 per cent per annum, the money to be suffered to accumulate in his hands for their benefit and the benefit of the other children; and in addition thereto he should be compelled to furnish them with boarding, lodging, and clothes, suitable to their condition. Per Rogers, J. Error to Berks Co.

Specht v. The Commonwealth,—Held, that the first section of the Act of 22d April, 1794, which prohibits any person from doing any worldly employment or business whatever on the Lord's Day, commonly called Sunday, (works of necessity or charity only excepted) is constitutional and does not interfere with the rights of conscience. 2. That one who regards the seventh day of the week as the true Sabbath, may be punished under the act for attending to his ordinary business on Sunday. 3. The selection of a period of rest is essentially a civil regula-

tion made for the government of man as a member of society. Per BELL, J.

COULTER, J. concurred in the judgment of the majority of the court but dissented from the reasons assigned in support of it. He believed the laws against Sabbath breaking constitutional because they guard the *Christian Sabbath* from profanation, and in the language of the Act of 1794, prohibit work or *worldly* employment on *the Lord's Day*.

BURNSIDE, J. was understood to concur with Mr. Justice Coulter.

NORTHERN DISTRICT.

Schroeder v. Decker et. al.—*Held*, 1. That the certificate by a judge or justice of the peace of a wife's separate examination and acknowledgment of a deed may be falsified by parol evidence of fraud, or concealed duress.

2. "The deed for a part of the property being executed while the wife was an infant is absolutely void, and the deed for the residue is open to objections as decisive."

Per Gibson, Ch. J. Error to Bradford Co.

For the Law Journal.

DAMAGES IN ACTIONS OF TORT.

In the case of *Good v. Mylin* as abstracted in the June No. of your Law Journal, the Supreme Court have overruled the cases of *Wilt v. Fickers*, 8 Watts 235, and *Rogers v. Fales*, 5 Barr 159, which recognize the principle that in actions *ex delicto* the jury may in their discretion com-

pensate the plaintiff for the trouble and expense to which he has been subjected in vindicating his rights by action. In delivering the opinion, Ch. Just. Gibson says "there is no precedent, but those cited, in the English or American books from the Norman conquest." In *Goodtitle vs. Tombs*, 3d Wilson, p. 118, 121, (a case since the Norman Conquest.) Mr. Just. Gould says that in an action of trespass for mesne profits, the plaintiff is not confined to the very mesne profits only, but he may recover for his trouble, &c. "I have known" says the learned judge, "four times the value of the mesne profits given by a Jury in this sort of action of trespass; if it were not to be so sometimes, complete justice could not be done to the party injured." In this opinion he is sustained by Ch. Justice Wilmot, and the case was accordingly so decided. Lancaster, June 17th, 1848. T. E. F.

For the Law Journal.

In *Good v. Mylin*, 7 Law Journal, 383, the Court after citing and overruling *Wilt v. Vickers*, 8 Watts 235, and *Rogers v. Fales*, 5 Barr 159, say there is no precedent, but those cited, in the English or American books from the Norman Conquest. The question before the Court was whether the jury were at liberty to compensate not only the injury laid, but the trouble and expense of establishing its existence. In *Barnard v. Poor* 21st Pick. 378, a case some what later than the Norman Conquest, the Court say, in case of trespass, or other action, for damages the jury in assessing damages, ought not to take into consideration counsel fees, or other expenses of prosecuting the suit beyond the taxed costs. O. H. B. Ebensburg June 22d, 1848.

Note by the editors of the Law Journal.

In 1814 the Supreme Judicial Court of Massachusetts seemed to be of opinion that of only the expenses of the suit in hand but those of another

in which he had failed by reason of a mistake in the form of the action might be recovered. *Cole v. Fisher* 11 Mass. 139. In 1821, in the same state, Mr. Justice Jackson in an action of trespass instructed the jury that they might add to the damages a reasonable sum to indemnify the pltf. for the expenses incurred in the prosecution of the action, and a verdict was accordingly rendered, including \$75 for such expenses.— But upon a motion for a new trial the court *were not agreed upon the subject*; whereupon the plaintiff released the \$75 and took judgment for the residue. *Rice v. Austin*, 17 Mass. 206. But in 1838, the court after admitting that the notion of recovering expenses of this kind in actions sounding in damages had formerly prevailed, held, as our correspondent states, that the contrary was now well settled. *Barnard v. Poor*, 21 Pick. 382. In the courts of the Federal Government, a practice has prevailed, in actions for infringement of patent rights, to allow the plaintiff to recover, as part of his damages, the reasonable fees paid to his counsel. This, we know, has been frequently done in the Eastern District of this state, and we perceive by the report of the case of *Gorham v. Mixer et al.* decided in the Circuit Court of the United States, in Massachusetts, Mr. Justice Sprague permitted a recovery of damages in which \$600 were expressly stated to be for counsel fees.

The London Jurist.—In looking over this periodical for February last we find a decision of Vice Chancellor Wigram, made in December last, in which it was held that where a British born subject had gone in 1784 to America, and become a citizen of the United States, and taken the oath of allegiance to that government, thereby abjuring his allegiance to the Crown of Great Britain, those acts fell short of bringing him under the disqualifying provisions of the 4 Geo. 2, c. 21, and therefore his grandson, on taking the oaths and doing the other acts required by the statute 13 Geo. 3, c. 21, was capable of inheriting lands in Great Britain (*Fitch v. Weber*.) It was also held that a party will be allowed a reasonable time after his title has accrued to do the acts required by the statute. The treaty of 1783 between the United States and Great Britain, it was held, empowers British born subjects then settled in the United States to become citizens of America, but does not empower British born subjects, proceeding to America, and settling there after the date of the treaty, to become such citizens.

We observe by an advertisement in the same number of the Jurist that the Executors of the late William Tidd were to sell the valuable law library of that eminent barrister on the 11th Feb. last, at 192 Fleet street, including in the sale "the entire remaining stock, in quires of Mr. Tidd's Practice, Practical Forms," &c. It will be remembered by our readers that so early as 1792 Mr. Tidd published a work on the law of costs in civil actions. In 1799 the 2d edition of his work on practice made its appearance in London, and in the same year his appendix of practical forms was first introduced to the public. His "Forms of proceeding in Replevin and Ejectment" were not published until 1804. His work on practice has had an extensive circulation and has gone through many editions, in England and in this country.

Several valuable works have been published since our last number which we are prevented from noticing at length by a press of other matter, but we hope to speak of them in our next. Among the works referred to are 6th Barr's Reports, by T. & J. W. Johnson, Phila. 2 Barbour's cases in the Court of Chancery of New York, by Banks, Gould & Co. New York. The New Library of Law & Equity, for April 1848, in which the valuable Digest of Admiralty decisions by Mr. Pritchard is commenced; Brightly's Digest of the Laws of Penn. from 22 April 1846 to 11 April 1848, by James Kay Jr. & Brother, Phila. The annual Report of the Hon. Edmund Burke, Commissioner of Patents; The New Code of Procedure of New York, &c. &c.

We tender our sincere thanks to *Correspondents*, for their kind favors received; and hope that they will excuse any delay which may occur in the publication of their valuable contributions. It is impossible to crowd every thing into a single number.

Our acknowledgments are due to *subscribers* and *advertisers* for the substantial proof they have given of their good opinion. Three or four months ago, our subscription list did not contain over four hundred names. Now, we print off *fifteen hundred copies*; and the cards on the cover show the extent of our advertising encouragement.

THE
AMERICAN LAW JOURNAL.

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SEPTEMBER, 1848.  
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THE CARLISLE SLAVE RIOT.

(*Communicated.*)

The recent decision of the Supreme Court in this case may be a humane one, but we think it exceedingly doubtful whether it is in accordance with the laws of this commonwealth. Adhering, as we do, to the almost forgotten maxim, *stare decisis*, we are free to acknowledge that the decision referred to must *now* be regarded as the law of Pennsylvania, but we must take the liberty of reviewing its reasoning and conclusions, and of showing, if we can, that it is not in accordance with existing laws as found upon our statute books. We think that the Supreme Court have been in this case making laws rather than administering them—have been exercising legislative, rather than judicial functions, and endeavoring to conform their decisions to what they believed morally right, and in accordance with the dictates of humanity, rather than construing the laws of the Commonwealth as they find them. We believe in the soundness of the remark of Justice Duncan, in delivering the opinion of the Supreme Court,
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in the case of the *Commonwealth v. James*, who was indicted for being a common scold, and in which it was decided, that the ducking stool was not the proper punishment to be inflicted in Pennsylvania. The learned Judge in that case says—"It is considered as a cruel, unusual, unnatural and ludicrous judgment. But whatever prejudices may exist against it, still if it be the law of the land, the court must pronounce judgment for it."

The whole question as to the legality of the sentence in this case, turns upon the single fact, whether the pillory punishment was in force in England, for the offence of Riot, in 1705, the date of our own statute defining what shall constitute a riot, and making rioters punishable in this province "*according to the laws of England.*" The 4th sec. of the act of 5th April 1790 (Dunlop 125, 2 Smith 531) substitutes imprisonment at hard labor not exceeding two years for a certain class of offences, in which, before the act of 15th September, 1786, the pillory and other punishments therein enumerated "*is, or may be inflicted.*" The supplement to the act of 1790, passed 4th April 1807, extended the punishment in the cases referred to for any period not exceeding seven years in the discretion of the judges. The act of 28th March 1831, gives authority to punish the defendants in the state penitentiary for the eastern district, where by "existing laws" they would be imprisoned in the jail and penitentiary house of Philadelphia for one year and upwards.

This would render the punishment in the penitentiary in the present case perfectly legal, if the pillory punishment was in force in England for riot, such as this was, in 1705, when our law was enacted—for the whole law of England relating to the punishment for riot is transferred *eo nomine* by that statute. It enlarges the offence, and specially makes the punishment such as was inflicted for riot according to the laws of England."

Justice Burnside therefore very properly states the true question when he says: "this leads us to inquire what was the law of England in 1705, and how far their statutory punishments were introduced into Pennsylvania;" and he should have added, that if the punishment for an aggravated riot in England at that date (1705) was in the pillory at the discretion of the court, then the defendants were properly sentenced under our laws. But if the pillory was not part of the punishment for aggravated riot by the laws of England in 1705, when our law, transferring their punishment for that offence to this province, was passed, the sentence is illegal and should be reversed.

It is a fundamental error in the opinion of Judge Burnside, that the Common Law punishment only for riot was transferred to this province by the law of 1705, and he confounds the different statutes vesting the authority to sentence, with the common law which imposes the penalty. Our law of 1705 most certainly never did authorize a sentence to be passed upon rioters by the King and his council, or by Star Chamber Judges, but it does in express terms direct that they shall be "punished according to the laws of England," by the tribunals of this country having jurisdiction of that offence. "The laws of England" combine the common, as well as the statute laws in reference to this offence, in force at that date; and although it is true that no *one* British Statute in reference to the offence of riot, was transferred to this country, or adopted in this province, the punishment inflicted by any one or all of them in 1705, was the punishment expressly provided for that offence by our own law at that date. The question stated by Judge Burnside, then recurs—what was the law of England in 1705, and what was its punishment, not by statute alone, or common law alone, but under the "*laws of England*?"

as provided in our act. Judge Burnside in his opinion admits, that the "Province of Pennsylvania adopted the English Common Law," and we suppose he will scarcely deny that this same common law was part of the "laws of England" covered by the provision in our act of 1705—and if so, the common law punishment for riot formed part of our statute law after the passage of the act referred to, until changed by the 4th section of the act of 5th April 1790, which substitutes imprisonment at hard labor for "burning in the hand, cutting off the ears, pillory," &c. In 1 Chitty criminal law Mar. page 710, under the head of judgment and its incidents, it is laid down, that all those offences which exist at common law, and have not been regulated by any particular statute are within *the discretion of the court to punish*, and refers to Rep. T. Hard. 279, 2 Hawk. P. C. c. 48, sec. 14, and every description of misdemeanor or crime for which an indictment will lie at common law, not subjecting the offender to a capital penalty, is within the discretion of the judges.—Rep. T. Hardw. 278, 9. Again Mar. Page 714, 1 Chit. Crim. Law, the punishment of all infamous crimes at common law, is, in general, disgraceful: as for keeping a house of ill fame; and so regularly was this followed, that the association between the crime and the punishment became so strong in the mind, that the latter, and not the former, was thought to entail disability to become a witness. And adds there were indeed instances (before 56 Geo. 3d c. 138 abolishing the punishment of pillory) to the contrary; where the *pillory was inflicted*, though the crime *was not infamous*, &c. [On Mar. page 715 (same book,) Lord Coke advises all judges and magistrates in general to be very careful how they inflict the pillory on common misdemeanors, and to reserve it only for the more heinous offences—3 Inst. 219; a caution which certainly presupposes the power to inflict such a punishment,

if they saw proper to exercise it, although intimating that it should be done with a sound discretion. Again, in speaking of the punishment for libels, &c. on same page he says—but more signal penalties will be inflicted on *public misdemeanors* attended with *violence*; thus before the riot act, several rioters were sentenced to pay a fine of \$500 each, to stand in the pillory, and one of them to be accoutred in a kettle on his head for a helmet, and a sword in his hand, because he was thus armed when he committed the outrage. Cro. Car. 507. In 3 Chitty Crim. Law Mar. page 490 in note it is distinctly alledged, that the punishment of the pillory is added in cases of riot of peculiar enormity. Hawk. P. C. b. 2 c. 65, s. 12 states the same to be law, and refers to Crompton 61, Dalt. 646, 2 Rolle's Abridgment, 208. In 1st Russel on Crimes, Mar. page 269, it is stated that the punishment for riots, &c. at common law is fine and imprisonment in proportion to the offence, and in cases of great enormity the offenders were sometimes punished in the pillory.

Thus then the pillory appears to have been a part of the punishment by "the laws of England" *for riot*, and is so recognized by Chitty, without any doubt or hesitation, so late as 1816. Dalton himself, whose book is published in 1705, and whom Justice Burnside has quoted with great satisfaction, at the same time that he speaks of riot being punishable by fine and imprisonment and as a trespass, mentions the fact of the Lords of the Star Chamber being empowered by statute 2nd Henry 5, c. 8 to assess upon rioters a greater penalty at their discretion. It is sufficient for the argument to know, that a discretion of that kind was vested somewhere, and whether in the breast of the sovereign himself, in his council, or in the judges of the realm, is immaterial. The fact of the abolition of the Star Chamber by 16 Charles, 1st Chap. 10, did not change the law as to pillory punishment, but left to

the discretion formerly exercised there in other judges. As well might we say that because we have no Court of Chancery *eo nomine* in Pennsylvania, our common law courts cannot exercise its powers; as to say that the abolition of a certain court in England, the Star Chamber if you please, changed the fixed and settled principles of the English law. The abolition of the Star Chamber was the result of their levying exorbitant fines upon the subject *in defiance of every principle of law*, to enrich the treasuries of the sovereign. An instance of which is given, when the judges imposed a fine of £30,000 upon the Duke of Devonshire for striking within the limits of one of his majesty's palaces. Other instances also occurred in which the most cruel punishments were inflicted on misdemeanors inferior to felony, see 4 Harg. St. Tr. 104, 5, 6. But immediately after the revolution these proceedings were declared oppressive and illegal; and by the bill of rights it was specifically enacted, that excessive fines be not imposed, nor cruel and illegal punishments inflicted, 1 W. & M. Sess. 2, c. 2, s. 11. And since this provision it is never usual to assess a larger fine than the delinquent is able to pay, without touching the means of his subsistence, but to sentence him to some corporal penalty. 4 Bla. Com. 380. 1 Chit. Crim. L. Mar. page 712, 13. It is therefore immaterial to the point in controversy to inquire what abuses fell with the cruel and inquisitorial Star Chamber, especially since the pillory punishment for riot and other offences has been recognized as a part of the "laws of England" long after the abolition of that court, see *Rex v. Spragg*, 2 Burrows' R. 1027, and indeed at a very recent period, by Chitty and other elementary writers already quoted.

But Justice Burnside with great simplicity remarks, after having unnecessarily lugged in the Star Chamber, which has nothing at all to do with the case, that—"In

Hawk P. C. chap. 68, sec. 12 we find that formerly, in cases of great enormity, offenders were punished with the pillory, but such punishment is now taken away by 36 Geo. 3, ch. 138." There is a mistake in the quotation as well as a few years in the judge's chronology.—Hawkins does not use the word "formerly," and it was not the statute 36 Geo. 3rd which abolished the pillory punishment, but the statute 56 Geo. 3d, passed in 1816,* and which never had any operation or force in Pennsylvania, and which had the same happy influence in England, that our own act of 1790 had in this state. But is not the inference from the passage of this statute an irresistible one—that the pillory punishment was inflicted in England, as laid down by the earlier elementary writers and continued to be until abolished, except for perjury and subornation of perjury, by the statute 56 Geo. 3rd, in 1816?

Carried away with "gorgons, hydras and chimeras dire" in reference to the calamities resulting from Star Chamber punishments, the Supreme Court seem to have decided in the present case, what in their opinion the law ought to be, rather than what it is. It would be no stigma to the criminal code of Pennsylvania, that the pillory has been abolished virtually by substituting a more humane punishment in its stead; and the Supreme Court is doing injustice to the benevolent law givers of 1790, (who went far ahead of their times in lessening criminal punishments) affecting to believe the substituted penalties as heinous in their nature as the original punishments; and in the language of Justice Burnside in this case "will not permit the supposed consequences of the pillory to find footing in our ameliorated system"—ma-

*In the manuscript from which we copied the opinion of Mr. Justice Burnside, the figures 56 might have been mistaken by our compositor for 36. It is highly probable that the mistake attributed by our correspondent to the Judge was a mere typographical error. *Ed. Amer. Law. Jour.*

king evidently "the supposed consequences of the pillory," as the provisions of the act of 1790 are termed, as great a scare crow as the pillory itself, where these "supposed consequences" when nothing more nor less than *abolition* of the pillory, and the enactment of benignant laws in its place. Such *consequences* are certainly not much to be dreaded in a civilized and christian community. In the same strain of reasoning we might argue that the declaration of American Independence, and the consequent establishment of a republican government were very inhuman measures, as they too might be called "the supposed consequences" of the arbitrary and tyrannical government of George 3rd, and the inherent defects of the British Constitution. This is a method of ratiocination to which we cannot subscribe, and which we conceive to be false and unfounded.

There is no doubt, as Judge Duncan remarks in the case of the Commonwealth v. James 12. S. & R. 231, but that the act of 1790 was the abolition of all infamous and disgraceful punishments for all classes of minor offences and misdemeanors—for even as to aggravated offences it substitutes in their room imprisonment at labor. The same eminent judge had repeated the same sentiment before, and in delivering the opinion of the Supreme Court in Rodgers vs. Commonwealth 5 S. & R. 464, he says, all those indictable offences which exist at the common law and which discover a meanness of disposition, every description of fraud, not amounting to felony, all misdemeanors and crimes not subjecting the offender to capital punishment; are punishable at the common law at the discretion of the court, with whipping and the pillory; including conspiracies, disorderly houses, libels on religion or government. Again page 466. "It was the intention of the legislature (by the 4th section of the act of 1790) to abolish whipping and the pillory, by the substitution

of confinement at hard labor, to subject to this punishment all those who were before the subjects of corporal punishments," &c. Now we would ask whether the Carlisle riot was not a grade of offence within this description of the Supreme Court as given by Judge Duncan; and being within it, whether it was not punishable by imprisonment at labor under the act of 1790, and by its supplements before referred to, in the Penitentiary? Was not this riot an aggravated one? Was it not a bold and high handed act of violence, not only calculated to disturb the peace of this community, but to excite insurrection and murder, bloodshed and a servile war, in our neighboring sister states? It was an infinitely stronger case than any one cited in Cro. Car. 507. The circumstances are nearly the same, but are much more aggravated in this, than in that case. In that, was no blood shed or loss of life—in this, a most estimable citizen of Maryland, while defending his own rights as guarantied to him by the constitution of his country and the laws of the land, was cruelly beaten, and no doubt died from the effects of the injuries received. The similarity between the case in Cro. Car. 507 referred to, and the present, is remarkable in another respect. It is there stated in giving the reasons for the judgment pronounced: "Wherefore because it was so great a riot and offence, being committed so near the court, it was adjudged," &c. While in this case, the riot was not commenced merely near the court, but in the court room itself, while one of the judges was on the bench, as if to make the defiance to all law and authority the more terrible and startling.

The decisions in Pennsylvania have heretofore been entirely consistent with our views of the law in this case. Whatever Judge Burnside's individual opinion may be, or that of the Supreme Court as now constituted, all the earlier cases to the present never questioned that the

pillory punishment might have been enforced in Pennsylvania, for the offences defined by Justice Duncan, until the passage of the law of 1790, substituting imprisonment at labor. Sentences were reversed but on other grounds than that. See the cases of the Commonwealth vs. Kremer 3 Bin. 577, Commonwealth v. White, 1 S. & R. 189, Commonwealth v. Scott 6 S. & R. 225, 6, 7, and Commonwealth vs. Grimes, 15 S. & R. 74. Nor should Justice Burnside's *recollection* as to what was done in western Pennsylvania, in the way of sentencing rioters, be permitted to alter an *express legislative enactment*. The question is, what does the Legislature authorize to be done for an offence of this grade? No one doubts but that milder punishment might have been inflicted in this case, but was the sentence warranted by the existing laws of the land? The western Judges may have regarded the troubles to which his Honor Judge Burnside alludes, more in the character of an insurrection than a riot—a determination on the part of the people to secure from their rulers a desired redress, which they thought themselves entitled to; and in convictions under such circumstances, a milder punishment would do more to quell such disturbances, than a severe one. But we do know that penitentiary punishment has been inflicted for riots since the act of 1790 and its supplements—and we think one of the judges on the Supreme Bench can and will bear witness to the same fact. Let the knowledge of one then balance the other; and as we have shown that the punishment of the pillory was applicable to cases of riot by the common law, although various English statutes sometimes vested that discretion in different persons, giving it now to the King's council, the Star Chamber, and then referring it back to the judges on the abolition of that body, it was still a part of "the laws of England" in 1705, and so recognised and treated in all the elementary

books on the subject—so that we are forced to the conclusion, that the punishment by the court below in this case was clearly within the various Acts of Assembly on the subject, acknowledging and enforcing as they do “*the laws of England*” incorporated in our own statute for the punishment of this grievous offence. S.



EXPARTE JOHN NUGENT, ON HABEAS CORPUS.

Circuit Court of the District of Columbia, May 1848.

1. Every Court, including the Senate and House of Representatives, is the sole judge of its own contempts; and in case of commitment for contempt, in such case, no other court can have a right to inquire *directly* into the correctness or propriety of the commitment, or to discharge the Prisoner on *Habeas Corpus*.

2. The warrant of commitment need not set forth the particular facts which constitute the alleged contempt.

3. The Senate of the United States has power to punish for contempts of its authority in cases of which it has jurisdiction, and an inquiry whether any person, and who, had violated the rule of the Senate which requires that all treaties laid before them should be kept secret until the Senate should take off the injunction of secrecy, is a matter within the jurisdiction of the Senate.

4. The Senate of the United States has a right to hold secret sessions whenever in its judgment the proceeding shall require secrecy, and may pronounce judgment in secret session, for a contempt which took place in secret session.

The petition for the writ of *Habeas Corpus*, stated that the said John Nugent was held in custody and close confinement by Robert Beale of the city of Washington, without any authority or warrant of law; and that the said Robert Beale has refused to exhibit to the petitioner the authority, if any, under which he pretends to hold him, and to give him a copy thereof, and to discharge him from custody, &c.

The writ of *Habeas Corpus* was thereupon issued by the Court on the 3rd of April 1848, returnable on the 4th.

The return stated that "the said Robert Beale holds the office of Sergeant at Arms of the Senate of the United States ; that the said Senate is, and has been long before the arrest of the said John Nugent, holding its regular sessions ; that certain proceedings were had before the said Senate, in Executive sessions, which said proceedings are, by the rules and orders of said Senate, had in secret session, and which the respondent cannot, without violation of his official oath and duty, divulge or make public. That this respondent, as such serjeant at arms, has received from the Hon. G. M. Dallas, vice president of the U. S. and president of the Senate, a warrant, by which he is ordered and directed, authorized and required to take into his custody the body of the said John Nugent and him safely keep according to the terms of said precept or warrant. That in obedience to the order and command of the said Senate of the United States, this respondent, as in duty bound, has arrested and now holds the body of the said John Nugent in legal custody, and now produces and exhibits to the court now here, the said order, precept and warrant, as the cause of the caption and detention by him as aforesaid of the body of the said John Nugent, as part of this his return."

This return was accompanied by the warrant, as follows :
United States of America—

"To the Sergeant at Arms of the Senate of the United States ; Robert Beale :

Whereas, John Nugent, having been summoned, and having appeared at the Bar of the Senate, and having been sworn as a witness, he answered the following interrogatories.

1. Have you any connexion with, or agency for the proprietor of the Newspaper published in the city of New

York, and called "the New York Herald?" If yea, state what is that connexion or agency.

2. Do you know that an instrument purporting to be a copy of the treaty between the U. S. of America and the Mexican Republic, with the amendments made by the Senate thereto, and the proceedings of the Senate thereon, was published in that newspaper? Declare.

3. Do you know by whom the copy of the instrument, with the amendments thereto, and proceedings thereon, in the last preceding interrogatory specified, was furnished to the Editor, or publishers, or any agent of the Editor or publishers, of the said Newspaper called the New York Herald? If yea, declare, and specify such person or persons.

4. Did you copy the parts purporting to be amendments of the treaty yourself for the purpose of sending them to the Editor of the New York Herald or for any other purpose? If you answer in the negative, then say if you know by whom they were copied.

5. Where, at what place or house, and at what time were the said amendments of the treaty copied?

And having refused to answer the following interrogatories:

6. Where, in what place or what house and at what time did you first receive a printed copy of the confidential document, containing the treaty, the President's Message and also the other confidential documents printed in the Herald?

7. In answer to the 3rd interrogatory you have stated that you furnished the papers, (therein referred to) to the Editor of the New York Herald. State from whom you received the said treaty with Mexico with the amendments and the said portion of the proceedings of the Senate.

8. In your answer to the 4th interrogatory you state that the amendments there referred to, were communica-

ted to the Herald in your handwriting. Did you copy the same, and from whom did you procure the original from which you copied the same.

9. You say in answer to the last question, that you decline to answer the same, because you cannot answer it with accuracy. State why you cannot answer it with accuracy. Is it because you do not recollect the facts inquired of.

10. What portion of the facts do you not recollect with accuracy, is it as to the person from whom you obtained the papers, or either of them referred to.

11. State from whom you received the treaty.

12. State from whom you received the documents.

13. State from whom you received the proceedings of the Senate heretofore inquired of.

14. Was the copy of the treaty you forwarded to the Herald a printed copy?—

—has, by so refusing, committed a contempt against the Senate; and has, by the Senate, been ordered into the custody of the Sergeant at arms, there to remain until the further order of the Senate.

These are therefore to authorize and require you, and you are hereby authorized and required to take into your custody, the body of the said John Nugent, and him safely keep until he answers the said interrogatories, or until the further order of the Senate of the United States in this behalf, and for so doing this shall be your sufficient warrant.

Given under my hand this thirty first day of March, in the year of our Lord one thousand eight hundred and forty eight.

G. M. DALLAS,

Vice President of the U. S. and President of the Senate.
Attest:

ASBURY DICKENS,

Secretary of the Senate of the United States."

CRANCH, C. J. *delivered the opinion of the Court.*

Upon this return of the *Habeas Corpus*, the principal questions are :

Has the Senate of the U. S. jurisdiction and power to punish contempts of its authority ? And if so,

Whether this court, upon this *Habeas Corpus*, can inquire into the question of contempt, and discharge the prisoner.

The jurisdiction of the Senate, in cases of contempt of its authority, depends upon the same grounds and reasons upon which the acknowledged jurisdiction of other judicial tribunals rests, to wit : the necessity of such a jurisdiction to enable the Senate to exercise its high constitutional functions—a necessity at least equal to that which supports the like jurisdiction which has been exercised by all judicial tribunals and legislative assemblies in this country from its first settlement, and in England from time immemorial. That the Senate of the United States may punish contempts of its authority seemed to be admitted by the prisoner's counsel, provided it be in a case within their cognizance and jurisdiction ; but whether admitted or not, such is the law as laid down by the Supreme Court of the U. S. in *Anderson v. Dunn*, 6 *Wheat.* 224, and in *Kearney's case*, 7 *Wheaton* 41.

Kearney's case was a petition to the Supreme Court of the U. S. for a *Habeas Corpus* to the Marshal, D. C. to bring up the body of J. T. Kearney who was committed by the Circuit Court, D. C. for contempt in refusing to answer a question in a criminal cause.

MR. JUSTICE STORY, in delivering the opinion of the court after citing *Brass Crosby's case* with approval said (in p. 44) “ so that it is most manifest from the whole reasoning of the court in this case, that a writ of *Habeas Corpus* was not deemed a proper remedy where a party “ was committed for a contempt by a court of competent

“jurisdiction ; and that if granted the court could not inquire into the sufficiency of the cause of commitment.—
 “If therefore we were to grant the writ in this case it would be applying it in a manner not justified by principle or usage ; and we should be bound to remand the party, unless we were prepared to abandon the whole doctrine, so reasonable, just and convenient, which has hitherto regulated this important subject.”

The same law was declared by the court of Common Pleas in the year 1771 in *Brass Crosby's case* 3 *Wils.* 188, in which (in p. 201) *Ld. Ch. J. DeGrey*, said, “perhaps a contempt in the House of Commons, in the chancery, in this court and in the court of Durham may be very different, therefore we cannot judge of it ; *but every court must be sole judge of its own contempts.* Besides, as the court cannot go out of the return of this writ, how can we inquire into the truth of the fact, as to the nature of the contempt.—
 “We have no means of trying whether the Lord Mayor did right or wrong.” And in p. 202, he says, “there is a great difference between matters of privilege coming incidentally before the court; and being *the point itself directly* before the court. *The counsel at the bar have not cited one case where any court of this Hall ever determined a matter of privilege which did not come incidentally before them.*” “But the present case differs much from those which the court will determine ; because it does not come incidentally before us, but is brought before us *directly, and is the whole point in question* ; and to determine it we must supersede the judgment and determination of the House of Commons and a commitment “in execution of that judgment.”

Mr. JUSTICE GOULD, in the same case, p. 203, said, “I entirely concur in opinion with *my Lord Ch. J.* that this court hath no cognizance of contempts or breach of privilege of the House of Commons. “*THEY are the only*

judges of their own privileges." And in p. 204, he says "when matters of privilege come *incidentally* before the court, it is obliged to determine them to prevent a failure of justice." "The resolution of the House of Commons is an adjudication, *and every court must judge of its own contempts.*"

Mr. JUSTICE BLACKSTONE, in the same case said, "I concur in opinion that we cannot discharge the Lord Mayor. The present case is of great importance because the liberty of the subject is materially concerned. The House of Commons is a Supreme Court, and they are judges of their own privileges and contempts, more especially with respect to their own members. Here is a member committed *in execution* by the judgment of his own House. All courts, by which I mean to include the two Houses of Parliament and the courts of Westminster Hall, are uncontrolled in matters of contempt.—The *sole* adjudication of contempts and the punishment thereof in any manner, belongs *exclusively*, and without interfering, to *each respective court*. Infinite confusion and disorder would follow if courts could, *by writ of Habeas Corpus*, examine and determine the contempts of others. This power to commit results *from the first principles of Justice*; for if they have power to decide, they ought to have power to punish; no other court shall scan the judgment of a superior court, or the principal seat of Justice. As I said before, it would occasion the utmost confusion if every court of this Hall should have power to examine the commitments of the other courts of the Hall, for contempts; so that the judgment and commitment of each respective court, as to contempts, must be final, and without control."

This case of *Crosby* was decided by the court of Common Pleas in the year 1771, and, as Mr. Justice STORY said, in delivering the opinion of the Supreme Court of

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the U. S. in Kearney's case, p. 43, *settled the law upon that point*. It must be remembered that the case of Crosby was upon *Habeas Corpus* and the court could not give relief without assailing the judgment of the House of Commons directly, and revising that judgment—but when the judgment of contempt comes before the court incidentally, or collaterally, its correctness may be questioned; as in cases where it is pleaded in justification as was done in the case of *Anderson v. Dunn*, 6 *Wheat.* 204.

The law as stated by the court in Crosby's case, was the law of the land both in this country and in England before our revolution, and has so continued to the present time.

In the case of *Stockdale v. Hansard*, for a libel, the dft. pleaded, in justification, an order of the House of Commons to print and publish the report of the inspectors of prisons, which contained the supposed libel. To this plea the plttf. demurred, and assigned for causes:—"that the known and established laws of the land cannot be superseded, suspended or altered by any resolution or order of the House of Commons; and that the House of Commons, in Parliament assembled, cannot by any resolution or order of themselves, create any new privilege to themselves inconsistent with the known laws of the land, and that if such power be assumed by them, there can be no reasonable security for the life, liberty, property or character of the subjects of the Realm."

The case was learnedly and elaborately argued in the year 1837, and decided in 1839, by the court of Queen's Bench.

One of the questions, raised in the argument, was whether the House of Commons had the right to assume the authority to settle its own privilege, and to be the sole judge of its existence and extent.

In p. 20, the Atty. GEN. CAMPBELL said—"another and

“a summary remedy might have been adopted ; that the House, having confidence in the tribunals of the country, deems it expedient to refer the case to the consideration of the court in the ordinary course of justice—*thereby* giving to the pl^{tf}. an opportunity either of denying that the act was done under the alleged authority, or of showing that the authority has been exceeded.”

In p. 22, he says, “here” (i. e. upon demurrer to the plea of justification under the order of the House of Commons) “the question of privilege is *directly* raised, and cannot, therefore, be inquired into by a court of common law.” And again he says, in p. 23,—“the most frequent cases in which the privilege of the Houses of Parliament has come in question directly, have been cases of *Habeas Corpus* on commitments by them—and *there the courts of common law have disclaimed jurisdiction*. So the question would arise *directly* if an action of trespass or false imprisonment were brought for such a commitment, and wherever it might be sought to over-rule an act done by either House and justified by its authority.—“The present,” he says, “is a case of that description.” “If the complaint appears on the record to be made against an act of one of the Houses, so that the court is called upon to say whether the privilege alleged in justification belongs to the House, or is usurped, the point of privilege arises *directly*, whether raised by the declaration, or by any subsequent pleading.” “With a question of privilege, raised *incidentally*, the court must deal as it best can.” “In such a case necessity may require that the existence of the privilege should be examined into; but the necessity which makes the rule points out its limit. Where an act of either house is complained of, no such necessity can exist. Here an adjudication has been made on the very point, and by a court of exclusive jurisdiction; and such an adjudication is binding.”

So much of the argument of the ATTORNEY GENERAL in the case of *Stockdale v. Hansard* seemed necessary to be stated that the opinion of LD. CH. J. DENMAN might be understood. The Atty. General contended, 1st, that when the question of privilege came *directly* before the Court it could not inquire into it ; and 2nd that in the case then before him it did come directly in question.

In support of the first proposition he cited the following cases, all of which were cases of *Habeas Corpus*.

1. *Sir Robt. Pye's case*, cited in 5 *How. St. Tr.* 948.

2. *Lord Shaftesbury's case*, 6 *How. St. Tr.* 1269, S. C. 1. *Mod.* 144, 3 *Keb.* 792, in which Sir Thos. Jones, Justice, said : "The cases, where the courts of Westminster Hall "have taken cognizance of privilege, differ from this case; "for in those it was only an *incident* to a case before them "which was of their cognizance; the *direct point* of the "matter now is the judgment of the Lords. This court "can neither bail nor discharge the Earl."

WYLDE, RAINSFORD and TWISDEN, Justices, concurred.

3. *Captain Streeter's case*, 5 *How. St. Tr.* 366.

4. *The Protector and Captain Streeter*, *Style* 415.

5. *Regina v. Paty*, 2 *Lord Raymond*, 1105, in which eleven of the 12 Judges agreed that the court of Queen's Bench had no jurisdiction in the case of Parliamentary commitment, and could not discharge the prisoners. But in that case,

HOLT, CH. J. who was the dissenting judge, said, in p. 1114, "as to what was said that the House of Commons "are judges of their own privileges, *that they are so when "it comes before them*. And as to the instances cited, where "the judges have been cautious in giving any answer in "Parliament in matters of privilege of Parliament; he "said the reason of that was because the members knew "probably their own privileges better than the Judges; "but when a matter of privilege *comes in question in West-*

"minster Hall, the Judges must determine it, as they did in *Bynion's case*.

6. *Alexander Murray's case*, decided in B. R. anno. 1751, 1 *Wilson* 299, upon *Habeas Corpus*, in which WRIGHT, J. said; "the House of Commons is undoubtedly an high court, and it is agreed, on all hands, that they have power to judge of their own privileges; it need not appear to us what the contempt was, for if it did appear we could not judge thereof." DENNISON, J. added, "this court has no jurisdiction in the present case. We granted the *Habeas Corpus*, not knowing what the commitment was; but now it appears to be for a contempt of the privileges of the House of Commons; what those privileges (of either house) are, we do not know, nor need they tell us what the contempt was, because we cannot judge of it."

7. *Brass Crosby's case*, 2. *W. Bl.* 754, upon *Habeas Corpus*, in which the counsel of the prisoner contended that the offence stated in the warrant of commitment was no contempt; and that that court had a right to judge of the privileges of the House of Commons; and was often obliged to take notice of them *incidentally*, as in *Mr. Wilkes' case*. But the court said, "they never discharge persons committed for a contempt by any Supreme Court. That the law has intrusted to these the power of judging of their own contempts."

8. In the case of *Alderman Oliver*, 2 *W. Bl.* 758, which was the same in its circumstances with that of Lord Mayor Crosby; a *Hab. Corp.* was sued out in the court of Exchequer, and a like judgment was given by the unanimous opinion of the Barons.

9. In *Rex v. Fowler*, 8 *T. R.* 314, Ld. KENYON said, "we were bound to grant this *Habeas Corpus*; but having seen the return, we are bound to remand the deft. to prison because the subject belongs *ad aliud examen*:"

and Gross, J. said : "that the adjudication of the House "on a contempt was a conviction and the commitment in "consequence, execution : that every court must be sole "judge of its own contempts ; and that no case appeared "in which any court of Westminster Hall ever deter- "mined a matter of privilege which did not come *inciden- tally* before them."

10. In *Rex v. Hobhouse*, 2 Chit. Rep. 207, the commit- ment was by the House of Commons for a contempt in publishing a libel. The Court said : "the cases of *Lord Shaftsbury* and *Rex v. Paty* are decisive authorities to "show that the courts of Westminster Hall cannot judge "of any law, custom or usage, and consequently they can- "not discharge a person committed for a contempt of Par- "liament. *The power of commitment for contempt is incident "to every court of justice ; and more especially it belongs to "the high court of Parliament ; and therefore it is incom- petent for this court either to question the privileges of "the House of Commons, or a commitment for an offence "which they have adjudged to be a contempt of those "privileges.*

11. In *Burdett v. Colman* in 14 East 163, the action was for false imprisonment, and the deft. an officer of the House of Commons, pleaded the order of the House in justification, and was acquitted. The case was taken up to the House of Lords, where it was held that the complaint was answered. *and that the warrant of commitment, would have sufficed on a return to a Habeas Corpus.*

12. In the case of *Stockdale v. Hansard*, 9 Adolphus & Ellis, 1, 36 Com. L. Rep. 74. Ch. J. Denman, said : "but "as to these proceedings by *Habeas Corpus*, it may be "enough to say that the present is not of that class ; and "that when any such may come before us, we will deal "with it as in our Judgment the law may appear to re- "quire."

Again, in the same case p. 79, 36 *Com. L. Rep.* Ch. J. DENMAN, says; "but even supposing this court would be bound to remand a prisoner committed by the House for a contempt, however insufficient the cause set out in the return—that could only be in consequence of the house having jurisdiction to *decide upon contempts*. In this case we are not trying the right of a subject *to be set free from imprisonment* for contempt; but whether the order of the House of Commons is of *power* to protect a wrong-doer *against making reparation* to the injured man."

Again, Ch. J. DENMAN, (in p. 82) in the same case, said: "the other concession" (of the Atty. General) "to which I allude, is, that when matter of privilege comes before the courts, *not directly, but incidentally*, they may, because they must decide it. Otherwise, said the Atty. Genl. there must be a failure of justice. And such has been the opinion even of those judges who have spoken with the most profound veneration of privilege. The rule is difficult of application."

In the same case, (*Stockdale v. Hansard*, p. 93, 36 *C. L. Rep.*) LITTLEDALE, J. says: "But it is said that the question of the privilege of the House of Commons comes *directly* before the court upon the pleadings; and that therefore, *upon all authorities*, it is quite clear it is not competent to this court to inquire into the question of privilege; and it is said that it is in effect the same case in principle as *Burdett v. Abbot*, 14, *East* 1, and that it was there held that the defence, being founded on the order of the House to do the thing complained of, raised the question of privilege *directly*; and that the court could not investigate the legality of that order. But this differs very materially from *Burdett v. Abbot*. That was an *action* against the speaker himself for an act done by him in the House. The act done by him was to commit an individual whom the House adjudged to be

“guilty of a contempt to the house, and who had been, for that, ordered to be taken into custody ; and there was a specific order of the house as to the particular thing to be done ; but this case is altogether different : these defendants are not members of the house, but agents employed by them. The plttf. is a perfect stranger to the House. He has been guilty of no insult or contempt of the House ; and there is no order of the house applicable to him. He stands, therefore, in the situation of a stranger to the house, complaining of persons who are not members of the House, but merely employed to distribute their papers. LORD ELLENBOROUGH, in the course of his judgment, says (14 *East* 138) that independently of any precedents or recognized practice on the subject, such a body as the House of Commons must, *a priori*, be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions may be. But yet when he comes to the summoning up the points for the consideration of the court, and gives the first part of his judgment, he says, first, that ‘it is made out that the power of the house of Commons to commit for contempt stands upon the ground of reason and necessity independent of any positive authorities upon the subject ; but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the courts of law, in a long course of well established precedents and authorities,’ 14 *East* 158. I admit that it is very difficult to draw the line between the question of privilege coming *directly* before the court ; and where it comes *incidentally* : the shades of difference run into one another. The decisions and *dicta* of the judges who have said that the House of Commons are the only judges of their own privileges, and that the courts of common law cannot be judges of the privileges of the

"House of Commons, are chiefly where the question has arisen on *commitments for contempt*; upon which no doubt could ever be entertained but that the House are the only judges of what is a contempt to their House generally; or to some individual member of it: but no case has occurred where the courts or judges have used any expressions to show that they are concluded by the resolution of the House of Commons in a case like the present."

Again, in p. 94, 36 Com. L. R. he says, "there is no doubt about the right, as exercised by the two Houses of Parliament in regard to *contempts* or insults offered to the House, either within or without their walls;" "and as to any other thing which may appear to be necessary to carry on, and conduct the great and important functions of their charge. In the case of *commitments for contempts* there is no doubt but that the House is the sole judge whether it is a contempt or not; and the courts of common law will not inquire into it. The greatest part of these decisions and *dicta*, where the judges have said that the Houses of Parliament are the sole judges of their own privileges. have been where the question has arisen upon *commitments for contempt*, and as to which, as I have before remarked, *no doubt can be entertained*."

"But not only the two houses of Parliament, but every court in Westminster Hall are themselves the sole judges whether it be a contempt or not; although in cases where the court did not profess to commit for a contempt, but for some matter which by no reasonable intendment could be considered as a contempt to the court committing, but a ground of commitment palpably and evidently *unjust and contrary to law and natural justice*, Ld. ELLENBOROUGH says, that in the case of such a commitment, if it should ever occur (but which he said he could not possibly anticipate as ever likely to occur) the court must look at it, and act upon it, *as justice may require*, from whatever court it may profess to have proceeded."

Again, LITLEDALE, J. *in p.* 102, says, "I therefore, upon the whole of this case, again point out what Lord Ellenborough very much relied upon in his judgment in *Burdett v. Abbot*, 14 East 158, when he said that, 'it is made out that the power of the House of Commons to commit for contempt, stands upon the ground of reason and necessity independent of any positive authorities on the subject; but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the courts of law in a long course of well established precedents and authorities.'" "But in the case now before the court (*Stockdale v. Hansard*) I think that the power of the House of Commons to order the publication of papers containing defamatory matter, does not stand on the ground of reason and necessity, independent of any positive authorities on the subject. And I also think that it is not made out by the evidence of usage and practice, by legislative sanction and recognition in the courts of law in a long course of well established precedents and authorities."

In the same case, (*Stockdale v. Hansard*) p. 107, 36 Com. L. Rep. PATTESON, J. said: "it is indeed quite true that the members of each House of Parliament are the sole judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority; and so they must adjudicate on the extent of their privileges. All the cases respecting commitments by the House, mostly raised upon writs of *Habeas Corpus*, and collected in the arguments and judgments in *Burdett v. Abbot*, 14 East, 1, establish, at the most, only these points that the House of Commons has power to commit for contempt; and that when it has so committed any person, the court cannot question the propriety of such commitment, or inquire whether the person committed had been guilty of a contempt of the House; in the same manner

as this court cannot entertain any such questions if the commitment be by any other court having power to commit for contempt. In such instances there is an adjudication of a court of competent authority in the particular case ; and the court which is desired to interfere, not being a court of error or appeal, cannot entertain the question whether the authority has been properly exercised.

"In order to make cases of *commitment* bear upon the *present* some such case should be shown in which the power of the House of Commons to commit for contempt under any circumstances was denied, and in which this court had refused to enter into the question of the existence of that power. But no such case can be found, because it has always been held that the House had such power ; and the point attempted to be raised, in the cases of commitment, has been as to the due exercise of such power. The other cases which have been cited in argument, relate generally to the privileges of individual members, not to the power of the House itself acting as a body ; and hence, as I conceive, has arisen the distinction between a question of privilege coming *directly* or *incidentally* before a court of law. It may be difficult to apply the distinction. Yet it is obvious that, upon an application for a writ of *Habeas Corpus* by a person committed by *the House*, the question of the power of the House to commit, or of the due exercise of that power, is the original and primary matter propounded to the *court*, and arises *directly*. Now as soon as it appears that the House has committed the person for a cause within their jurisdiction, as, for instance, a contempt *so adjudged by them to be*, the matter has passed in *rem judicatum*, and the court, before which the party is brought by writ of *Habeas Corpus*, must remand him. But if an action be brought in this court for a matter over which the court has general jurisdiction ; as, for instance, for a libel, or for an assault and

imprisonment, and *the plea first declares* that the authority of the House of Commons, or its powers, are in any way connected with the case, the question may be said to arise incidentally. The court must give some judgment—must somehow dispose of the question. I do not, however, lay any great stress on this distinction. It seems to me that if the question arises *in the progress of a cause*, the court must of necessity adjudicate upon it, whether it can be said, in strict propriety of language, to arise *directly or incidentally*."

In the same case, (*Stockdale v. Hansard*, p. 121, 122) COLERIDGE, J. said: "I know it will be said that in many of the cases alluded to the question of privilege has arisen *incidentally* only; and that in such, *ex necessitate* the courts have interfered. In what sense "*incidentally*" is here used, has been often asked, and never, as yet, satisfactorily answered. In what sense a greater necessity exists in one case than the other, has not been made out. The cases of *Habeas Corpus* are generally put as instances where the question arises *directly*. Let me suppose the return to state a commitment by the speaker under a resolution of the House ordering the party to capital punishment for a larceny committed; it will hardly be said that a stronger case of necessity to interfere could be supposed; and yet it must be admitted on the other hand, the question of *privilege or power*, [between which the argument for the defts. makes no difference] would arise *directly*. A case therefore may be supposed in which it would be necessary to interfere, even when the so doing would be a direct adjudication upon the act of the House. It should seem then that some other test must be applied to ascertain in what sense it is true that the House can alone declare and adjudicate upon its own privileges.

"I venture with great diffidence to submit the view which I have taken of these embarrassing questions, not as

claiming the suspicious merit of novelty, but as one which will at least remove all difficulties in theory, and be found, I believe, not inconsistent with the general course of authorities. I say *general course* ; for during so long a series, carried through times so differing in political bias and between such parties as either House of Parliament on one side, and the courts of law, individual judges or litigant suitors on the other, it would be quite idle to expect that any one uniform principle should be found to have invariably prevailed.

“In the first place I apprehend that the question of privilege arises *directly* wherever the House has adjudicated upon the very fact between the parties, and there only : Wherever *this* appears and the case *may be* one of privilege, no court ought to inquire whether the House has adjudicated properly or not. But whether directly arising or not, a court of law, I conceive, must take notice of the distinction between *privilege* and *power* ; and where the act has not been done *within the House* (for of no act there done, can any tribunal, in my opinion, take cognizance but the House itself) and is clearly of a nature transcending the legal limits of privilege, *it* (the court,) will proceed against the doer as a transgressor of the law.

To apply these principles to the case in which on the return to a *Habeas Corpus*, it appears that the House has committed for a contempt in the breach of its privileges. I subscribe entirely to the decisions, and I agree also with the *dicta* which, in some of them, this court has thrown out on supposed extreme cases. In every one of these cases the House has actually adjudicated on the very point raised in the return, and the committal is in execution of its judgment. In all of them the warrant, or order, has set out that which, on the face of it either clearly is, or may be, a breach of privilege ; or it has contented itself with stating the party to have been guilty of a contempt, with-

out specifying the nature of it, or the acts constituting it. *Brass Crosby's case*, 3 Wils. 188, is an instance of the former. *Lord Shaftesbury's* 1 Mod. 144, of the latter. The difference between the two is immaterial on the present question, which is one of jurisdiction only. Although, in the case of an inferior court over which this court exercises a power of revision and control even in matters directly within their cognizance, it will require to see the cause of committal in the warrant, yet, with regard to courts of so high a dignity as the Houses of Parliament, if an adjudication be stated generally, *for a contempt, as contempts are clearly within their cognizance*; a respectful and a reasonable intendment will be made that the particular facts on which the committal in question has proceeded, warranted it in point of jurisdiction; for, (that being assumed,) the propriety of the adjudication, would of course, not be inquired into. But in both cases the principle of the decision is that there has been an adjudication by a court of competent jurisdiction. Thus, in the former, DE GREY, Ch. J. says: 'When the House of Commons *adjudge* any thing to be a contempt, or a *breach* of privilege, their adjudication is a *conviction*, and their commitment in consequence, is *Execution*; and no court can discharge, or bail a person that is in execution by the judgment of any other court. The House of Commons, therefore, *having an authority to commit*, and that commitment being an Execution, the question is, what can this court do? It can do nothing when a person is in execution by the judgment of a court of competent jurisdiction: In such case this court is not a court of appeal.' And in the latter, in which the main contest was on the *generality* of the order of the Lords, RAINSFORD, Ch. J. says: (1 Mod. 158.) 'The commitment, in this case, is not for safe custody, but he is *in execution on the judgment given by the Lords for the contempt*; and therefore if he be bailed he will be delivered

out of execution ; because for a contempt *in facie curiæ* there is no other judgment or execution.'

"The same principle will explain and justify the observations which have been made by different judges from time to time, with regard to supposed cases, even of direct adjudication ; and if it should appear that the vice, alleged against the proceeding, is not of improper decision, or excess of punishment, but a total want of jurisdiction ; in other words, where it is contended that either house has not acted *in the exercise of a privilege, but in the usurpation of a power*, it cannot be doubted that the same judges *who* were most cautious in refraining from interfering with privilege, properly so called, would have asserted the right of the court to restrain the undue exercise of power. The fact of adjudication *then* has no weight, because the court adjudging had no jurisdiction. Many such instances have been referred to in the argument. I pass over the luminous, and, as I think, the still unanswered judgment of LORD HOLT in *Regina v. Paty*, 2 *Ld. Raym.* 1012, (and the judgments, &c. cited *p.* 39) which is bottomed *on this principle* ; but I will cite by way of illustration, the *dicta* of Ld. KENYON and Ld. ELLENBOROUGH whom I select not only for their pre-eminent individual authority, but also because I can cite from their judgments in cases in which they were, with a firm and favorable hand, upholding the just privileges of the Commons. And it is satisfactory to see that the *distinction* was even then present to their minds."

"Ld. KENYON in *Rex v. Wright*, 8 *T. R.* 296, after saying 'this is a proceeding of one branch of the Legislature and therefore we cannot inquire into it,' immediately qualifies the generality of that remark, by adding, 'I do not say that cases may not be put in which we would inquire whether or not the House of Commons were justified in any particular measure : if, for instance, they

should send their serjeant at arms to arrest a counsel here who was arguing a case between two individuals ; or to grant an injunction to stay proceedings here in a common action, undoubtedly we should pay no attention to it.'— In each case here supposed there would have been a *direct* adjudication upon the very matter ; and in each, there would have been a claim of privilege ; but the facts would have raised the preliminary question, whether privilege or not ; into that inquiry Ld. KENYON would have felt himself bound to enter ; and when he had satisfied himself that there was no such privilege the fact of jurisdiction would have become immaterial.

“So in the most learned and able argument of Holroyd, in *Burdett v. Abbot*, 14 *East* 128, when he had put a case of the Speaker issuing his warrant, by the direction of the House, to put a man to death, Ld. ELLENBOROUGH interposed thus : ‘the question in all cases would be whether the House of Commons were a court of competent jurisdiction for the purpose of issuing a warrant to do the act. You are putting an extravagant case. It is not pretended that the exercise of a general jurisdiction is any part of their privileges. Where that case occurs, (which it never will) the question would be whether they had general jurisdiction to issue such an order ; and no doubt the courts of justice would do their duty.’ This case again supposes an adjudication ; but can *language* be more clear to show the undoubting opinion of that great judge that it would have been still open to this court to inquire into the jurisdiction of the House. And can any one seriously believe that the fact of a previous declaration, by the House, that they had such jurisdiction, would have been considered by him as shutting up that inquiry ?

“Again the same principle relieves me from all difficulty as to cases where, at first sight, the question appears to arise directly, but where, still, the court of law would

have to determine the case before it upon facts already directly adjudicated upon by the House. Such was the celebrated case of *Burdett v. Abbot*, 14 East 1, in the decision of which I most heartily concur. There the action was *tresspass quare clausam fregit* and assault and false imprisonment: but the defence was a procedure in execution of a sentence of the House of Commons. If that sentence were pronounced by a competent court, it warranted all that was done. The only question that could be made upon any principle of law, was the competency of the adjudicating court: and the competency of the House to commit for a contempt, being not seriously doubted, there was a direct adjudication, into the propriety of which this court would not inquire. It could not inquire into it *without trying over again what has already been decided in the House, i. e.* whether Sir Francis Burdett had been guilty of a contempt: *but this would have been contrary to the plainest principles of law.*"

In the case of the *Sheriff of Middlesex*, *Hillary Term*, 1840, 11th *Adolphus & Ellis* 273, 39 C. L. R. 80, a motion was made in B. R. for a *Habeas Corpus* to the serjeant at arms of the House of Commons to bring up the bodies of Wm. Evans, Esq. and John Wheelton, Esq. with the day and cause of their being taken and detained, &c. The writ was issued, and the serjeant at arms returned that he took and still detains the said Wm. Evans, and John Wheelton, by virtue of the following warrant under the hand of the Speaker of the House of Commons.—*Martis 21'o. die Januarii 1840.*

"Whereas the House of Commons have this day *resolved* that Wm. Evans, Esq. and John Wheelton, Esq. Sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the serjeant at arms attending this House, These are therefore to require you to take into your
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custody the bodies of the said William Evans and John Wheelton, and them safely keep during the pleasure of this house; for which this shall be your sufficient warrant.

Given under my hand, the 21st day of January, 1840,

CHARLES SHAW LEFEVRE,

Speaker.

To the Serjeant at Arms attending the House of Commons."

The return being filed, the counsel for the prisoners contended that the return was bad on these grounds:

First, that there was in fact no legal cause for the commitment; *that the court may inquire into this*, by the statute of 56 G. 3, c. 100, which enacts "that where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit) a judge shall, on proper complaint, award a *habeas corpus*" and that in all cases provided for by the act, although the return to the *habeas corpus* be sufficient in law, it shall be lawful for the judge before whom it is returnable, to examine into the truth of the facts therein set forth, *by affidavit or by affirmation, &c.* and to do therein as to justice shall appertain."

And the counsel of the prisoners contended that "if the court may inquire into the truth of the facts it is shown here, on affidavit that the Sheriff is committed for having acted in the lawful execution of process, and that the proceeding of the House of Commons is in opposition to the judgment delivered in *Stockdale v. Hansard*, 9 *Adolphus & Ellis*, 1, 36 E. C. L. R. 13, which, until reversed on appeal, is the law of the land."

Secondly, (in p. 84) the counsel of the prisoners contended that "the return is bad *because it does not state the facts on which the contempt arises*," and they said (p. 84) "there are only three precedents of Parliamentary com-

mitments which have been supported, where no grounds were set forth." "The first is in *Streater's case*, 5 How. St. Tr. 365, which from the absurdity of the reasons by which the commitment was upheld, cannot be considered of any weight. The next occurs in the *Earl of Shaftesbury's case*, 4 How. St. Tr. 1269, S. C. 1 Mod. 144, which was decided in bad times and is not a precedent by which any subsequent decision can be supported. The proceedings of the House of Lords, against the Earl, were by the House itself declared unparliamentary, and ordered to be vacated in the Journals that they might never be drawn into precedent, 6 How. St. Tr. 1310." "The third instance, and the only one since the Revolution, was in *Alexander Murray's case*, 1 Wils. 299. There indeed two of the judges, one of whom relied on the case of Lord Shaftesbury, said that "if the contempt had been specified, this court could not judge of it; but the third, FOSTER, J. appears to have relied upon the circumstance of the contempt being committed in the face of the House; and the particular point now in question does not seem to have been taken at the bar. In more modern cases the grounds from which the contempt was deduced have always been stated. It was so in *Brass Crosby's case* 2 W. Bl. 754, S. C. 3 Wills. 188, though DE GREY, Ch. J. said there, as appears from 3 Wils. 203, that a return stating the breach of privilege generally would be sufficient; but he seems to ground that opinion entirely on the Earl of Shaftesbury's case. In *Rex v. Flower*, 8 T. R. 314 the warrant was special; so were those in Sir Francis Burdett's case 14 East, 1. Lord Ellenborough there intimated that a commitment stated to be for a contempt of either house, generally, would be sufficient; but the opinion is thrown out obiter, and he seems to consider Lord Shaftesbury's case an authority for such a form. In the case of *Burdett v. Abbot*, 5 Dow. 165, 199, in the House of Lords, LD. EL-

DON, put it to the judges "whether, if the court of Common Pleas, having adjudged an act to be a contempt of court, had committed, for the contempt, under a warrant stating such adjudication generally, and the matter came before the King's Bench on return to a *habeas corpus*, setting forth the warrant, that court would discharge because the particular facts and circumstances of the contempt were not set forth;" and the judges answered in the negative. But, in the case supposed, the common pleas would be a court of record acting according to the known course of the common law: the House of Commons is not such a court, or so acting; and the common pleas, in the case supposed, would be punishing for a contempt of court. The House of Commons here professes only to commit for a contempt of the privileges of that House, without showing what are the privileges which are supposed to be infringed. If the House may declare its own privilege as the common law courts declare that law, it should, at least, when it punishes for a breach of privilege, point out the privilege violated, so that the law on that subject may be known in future." "In the judgment of VAUGHAN, Ch. J. in *Bushell's case*, *Vaughan*, 135, 137, it is said, that the writ of *habeas corpus* commands the day and the cause of the caption and detaining of the prisoner to be certified upon the *return*, which if not done the court cannot possibly judge whether the cause of the commitment and detainer be according to law or against it. Therefore the cause of the imprisonment ought, by the return to appear as specifically and certainly to the judges of the return as it did to the court or person authorized to commit—else the return is insufficient. The House of Commons, then, like other jurisdictions that exercise the power of committing may be required, on *habeas corpus*, to show the particular grounds. And were it otherwise, the House of Parliament might, at any time

punish offences against the property, or servants of individual members, under the name of contempts, as was done formerly. That the court would not now suffer this practice to pass unquestioned though the contempt might be alleged generally on a return to a *habeas corpus* appears from several passages in the judgment of Ld. DENMAN, Ch. J. in *Stockdale v. Hansard* 9 Adolphus & Ellis, 116, 124, 147, 36 E. C. L. Rep. 31."

No one appeared in support of the return.

Ld. DENMAN, Ch. J. said, "I think it necessary to declare that the judgment delivered by this court last Trinity term in the case of *Stockdale v. Hansard* 9 Adolphus & Ellis, 1, 36 E. C. L. Rep. 13, appears to me in all respects correct. The court decided there, that there was no power in this country above being questioned by law.— And (in p. 87) he said: "the only question, upon the present return, is whether the commitment is sustained by a legal warrant." After stating and over ruling some minor objections, he says: (in p. 87.) "The great objection remains behind—that *the facts which constitute the alleged contempt, are not shown by the warrant.* It may be admitted that words containing this kind of statement have appeared in most of the former cases; indeed there are few in which they have not."

"In *Brass Crosby's* (2 *W. Bl.* 754, S. C. 3 *Wils.* 188) Sir Francis Burdett's (14 *East* 1) and Mr. Hobhouse's (2 *Chitty Rep.* 207) cases, words were used showing the nature of the contempt. In the Earl of Shaftesbury's case (6 *How. St. Tr.* 1269, S. C. 1 *Mod.* 144) the form was general; and it was held unnecessary to set out the facts upon which the contempt arose. That case is open to observation upon other grounds, but I think it has not been questioned upon this. In *Regina v. Paty* 2 Lord Raym, 1105, three of the judges adopted the doctrine of that case to the extent of holding that the court could not in-

quire into the ground of the commitment, even when expressed in the warrant. HOLT, Ch. J. differed from them on that point; but he did not question that where the warrant omitted to state facts, the cause could not be inquired into. In Murray's case, 1 *Wils.* 299, which has been often referred to and recognized as an authority, the warrant was in a general form. There is, perhaps, no case in the books entitled to so great weight as *Burdett v. Abbot*, 14 East 1, from the learning of the counsel who argued and the judges who decided it, the frequent discussions which the subject underwent, and the diligent endeavors made to obtain the fullest information upon it. The judgment of Ld. Ellenborough there, as it bears on the *point* now before us, is remarkable. He says: "if a commitment appeared to be for a contempt of the House of Commons *generally*, I would neither in the case of that court, or of any other of the superior courts, inquire futher; but if it did not profess to commit for contempt, but for some matter appearing upon the return which could, by no reasonable intendment, be considered as a contempt to the court committing, but a ground of commitment palpably and evidently arbitrary, unjust and contrary to every principle of positive law, or natural justice, I say that in case of such a commitment, (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur) we must look at it and act upon it as justice may require; from whatever court it may profess to have proceeded." BAYLEY, J. as well as Ld. ELLENBOROUGH, appears in that case to have been of opinion, that if particular facts are stated in the warrant and do not bear out the commitment the court should act upon the principle recognized by Ld. HOLT, in *Regina v. Paty*; but that if the warrant merely state a contempt in general terms, the court is bound by it. That rule was adopted by this Court in *Rex v. Hobhouse*; and in the late case

of *Stockdale v. Hansard*, 9 A. & E. 1, 36 E. C. L. Rep. 13, there was not one of us who did not express himself conformably to it. In the passages which have been cited from my own judgment in that case, as showing that if a person were committed for a contempt in trespassing upon a member's property, this court would notice the ground of committal, I always supposed that the insufficient ground should appear by the warrant.

“The Earl of Shaftesbury's case has been dwelt upon in the argument as governing the decisions of the courts on all subsequent occasions; but I think not correctly.—There is something in the nature of the Houses themselves which carries with it the authority that has been claimed; though in the discussion of such questions, the last important decision is always referred to. Instances have been pointed out in which the crown has exerted its prerogative in a manner now considered illegal, and the courts have acquiesced; but the cases are not analogous. The Crown has no rights which it can exercise otherwise than by process of law and through amenable officers; but Representative bodies must necessarily vindicate their authority by means of their own; and those means lie in the process of committal for contempt. This applies not to the Houses of Parliament only, but, as we observed in *Burdett v. Abbot*, 14 East 138, to the courts of Justice which, as well as the Houses, must be liable to continual obstruction and insult if they were not intrusted with such powers. It is unnecessary to discuss the question whether each House of Parliament be or be not a court; it is clear they cannot exercise their proper functions without the power of protecting themselves against interference.—The test of the authority of the House of Commons in this respect, submitted by Lord Eldon to the judges in *Burdett v. Abbot*, 5 Dow. 199, was, whether, if the court of common pleas had adjudged an act to be a contempt of

court, and committed for it, stating the adjudication generally, the court of King's Bench on a *habeas corpus* setting forth the warrant, would discharge the prisoner because the facts and circumstances of the contempt were not stated. A negative answer being given. Ld. ELDON, with the concurrence of Ld. ERSKINE, (who had before been adverse to the exercise of jurisdiction,) and without a dissenting voice from the House, affirmed the judgment below. And we must presume that what any court, much more what either House of Parliament, acting on great legal authority, takes upon it to pronounce a contempt, is so.

"It was urged that this, not being a criminal matter, the court was bound by the stat. 56 G. 3, c. 100 to inquire into the case on affidavit. But I think the provision cited is not applicable. On the motion for a *habeas corpus* there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case; and I think the production of a good warrant is a sufficient answer. Seeing that, we cannot go into the question of contempt on affidavit nor discuss the motives which may be alleged." "In the present case I am obliged to say that I find no authority under which we are entitled to discharge these gentlemen from their imprisonment."

LITLEDALE, J. concurred, and said: "if the warrant returned be good on the face of it, we can inquire no further. The principal objection is that it does not sufficiently express the cause of commitment; and instances have been cited in which the nature of the contempt was specified. But the doctrine, laid down in *Burdett v. Abbott*, 14 East 1, 5 Dow. 165, in this court and before the House of Lords, sufficiently authorizes the present form. If the warrant declares the grounds of adjudication, this court, in many cases will examine into their validity; but if it does not, we cannot go into such an inquiry. Here we

must suppose that the House adjudicated with sufficient reason, and they were the proper judges."

WILLIAMS, J. said : (in p. 90,) "It was a startling admission in the argument which has been addressed to us, that for the last century and an half there have been precedents in favor of this commitment. Recognized precedents have the force of decisions by which courts and judges individually must hold themselves bound. I do not think this court can suffer any loss of authority by so acting in the present case ; but whatever may be the consequences we must overlook it when there is an ascertained rule of law before us. If the return, in a case like this, showed a frivolous cause of commitment—as for wearing a particular dress, I should agree in the opinion expressed by Ld. ELLENBOROUGH in *Burdett v. Abbott*, where he distinguishes between a commitment, stating a contempt generally, and one appearing by the return to be made on grounds palpably unjust and absurd." "Then the only point in this case is whether there be on the warrant, an adjudication, in form, of commitment for contempt, which the court according to precedent is bound to recognize." "The only real question is whether we can interfere because the ground of commitment is not particularly stated. On this point it is sufficient to cite the judgment of DE GREY, Ch. J. in *Brass Crosby's case*, which is referred to with approbation by Ld. ELLENBOROUGH in *Burdett v. Abbott* 14 East 1, 148."

COLERIDGE, J. (in p. 91) says : "I come to my present conclusion with great regret when I consider the circumstances ; but with confidence to its justice. As to the former case of *Stockdale v. Hansard*, 9 A. & E. 1, 36 E. C. L. Rep. 13, so far as regards the general positions there laid down, I most entirely agree in them and remain of the same opinion as when it was decided. I formed that opinion with great pains and labor and a candid attention

to the arguments." "The material questions here are whether the return is not bad for not disclosing the particular grounds of the commitment; and whether it is open to an answer by affidavit; or if it be so, whether there is any case made by the affidavits. Now, first it is too late to contend that the generality of statement in the warrant is any solid objection. It appears by precedents that the House of Commons have been long in the habit of shaping their warrants in that manner. Their right to adjudicate in this general form in cases of contempt, is not founded on privilege, but rests upon the same grounds on which this court or the court of common pleas might commit for a contempt without stating a cause in the commitment." It is contended that affidavits may be received to explain the facts returned. But the return states simply an adjudication of contempt. There is nothing in the affidavits referred to, which controverts the fact of such an adjudication; and if the House had jurisdiction to make it, we can no more inquire, by affidavit, whether they came to a right conclusion in doing so, than we could in the case of a like adjudication by the court of common pleas. These gentlemen must therefore be remanded."

These cases and authorities, we think, show conclusively, that the Senate of the United States has power to punish for contempts of its authority, in cases of which it has jurisdiction; that every court, including the Senate and House of Representatives, is the sole judge of its own contempts; and that in case of the commitment for contempt in such a case, no other court can have a right to inquire *directly* into the correctness or propriety of the commitment, or to discharge the prisoner on *Habeas Corpus*, and that the warrant of commitment need not set forth the particular facts which constitute the alleged contempt.

There were many cases cited in the argument to show that when the question of privilege or contempt came incidentally before the court, the court would and must decide it; but those cases have no bearing upon this, which is a case of *Habeas Corpus*; where it is admitted on all hands that the question of contempt is brought directly before the court.

But if upon this point, it should be thought that the majority of the judges of this court have, (as it is suggested,) stated the principle too broadly in respect to the conclusive effect of a judgment of contempt, and if it should be deemed necessary that it should appear in the return of the *Habeas Corpus*, that, at the time of the supposed contempt, the Senate were acting in a matter of which they had jurisdiction—we all think it *does* sufficiently appear, in the return, that the Senate were, at that time, engaged in a matter within their jurisdiction, to wit, an inquiry whether any person, and who, had violated the rule of the Senate which requires that all treaties laid before them, should be kept secret until the Senate should take off the injunction of secrecy. This appears by the interrogatories propounded to the witness, (the prisoner) as stated in the return, and by the recital in part of the answers of the witness to a part of those interrogatories.

But it has been contended also in argument, that the power of the Senate to punish for contempts, is confined to their authority over their own members.

It is true that by the Constitution, Art. 1, s. 5, "each house may determine the rules of its proceeding; punish its members for disorderly behaviour; and, with the concurrence of two thirds, expel a member." But it says nothing of contempts. These were left to the operation of the common law principle, that every court has a right to protect itself from insult and contempt, without which right of self protection they could not discharge their

high and important duties. It is not at all probable that the framers of the Constitution, by giving an express power to the Senate to punish its members for disorderly behaviour and even to expel a member, intended to deprive the Senate of that protection from insult which they knew very well belonged to, and was enjoyed by both Houses of Parliament and the Legislatures of the former colonies and now states of this Union. The provision of the constitution may have been intended to remove a doubt whether a member of the Senate, appointed by, and responsible to a State Legislature, could be guilty of a contempt to a body of which he himself was a member; or it may have been intended to apply only to such disorderly behaviour as did not amount to a contempt of the house; or to remove a doubt whether the Senate had power to expel a member. But whatever may have been the intention, we think the provision does not justify an inference that their power to punish for contempts can be executed only upon members of the Senate.

On this point Mr. Justice Johnson in delivering the opinion of the Supreme Court in the case of *Anderson v. Dunn*, 6 Wheaton, said: (in p. 225,) "It is certainly true that there is no power given by the Constitution to either House, to punish for contempts, except when committed by their own members; nor does the judicial or criminal power given to the United States, in any part, extend to the infliction of punishment, for contempt of either House, or any one co-ordinate branch of the Government. Shall we therefore decide that no such power exists? It is true that such a power, if it exists, must be derived by implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government, which would have left nothing to implication, it cannot be doubted, that the effort would have been made

by the framers of the Constitution. But what is the fact? There is not in the whole of that admirable instrument, a grant of powers, which does not draw after it others not expressed, but vital to their exercise ; not substantive and independent, but auxiliary and subordinate. The idea is utopian that government can exist without leaving the exercise of discretion some where. Public security against the abuse of such discretion, must rest on responsibility, and stated appeals to public approbation." And again, (in p. 226,) he says : "But if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have entrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation; nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers." "The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights. That the 'safety of the people is the Supreme Law' not only comports with, but is indispensable to the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is that courts of Justice are universally acknowledged to be vested by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." "It is true that the courts of Justice of the United States are vested by express statute provision with power to fine and imprison for contempts ; but it does not follow from this circumstance that they could not have exercised that power without the aid of the statute, or not in cases, if such should occur, to which such statute provision may not extend ; on the contrary, it is a Legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt, shall not extend beyond its

known and acknowledged limits of fine and imprisonment."

Again the same Judge (in p. 228) says the alternative of denying this power "leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt, the soundness of any argument, from which it is derived. That a deliberative assembly, clothed with the majesty of the people, and charged with a care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness or repel insult, is a supposition too wild to be suggested."

And again (at page 232,) "But it is argued that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the House of Representatives, that the express grant of power to punish their members respectively and to expel them, by the application of a familiar maxim raises an implication against the power to punish any other than their own members. This argument proves too much; for its direct application would lead to the annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only, and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one that the express grant in one class of cases repelled the assumption of the punishing power in any other."

"The truth is that the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or com-

municate it. Constituted as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor, or interests of the State which sent him." "In reply to the suggestion that on this same foundation of necessity might be raised a superstructure of implied powers in the Executive and every other department, and even ministerial officer of the government, it would be sufficient to observe, that neither analogy nor precedent, would support the assertion of such a power in any other than a legislative or judicial body."

It was also contended in argument that although the Senate might hold secret sessions, they could not, in secret session, punish a man for a contempt. The court, however, cannot perceive any reason why the Senate should not have the same power of punishing contempts in secret as in open session. In the early years of this government the sessions of the Senate were always secret.

The Constitution of the U. S Art. 1 s. 5, requires that "each House shall keep a journal of its proceedings and from time to time publish the same ; excepting such parts as may in their judgment require secrecy." The journal cannot be kept secret unless the proceedings themselves be kept secret. Hence, each house has a right to hold secret sessions whenever in its judgment the proceedings shall require secrecy." The necessity of the power to hold secret sessions, especially of the Senate, is so obvious that no argument in its favor is required by the court.

The Senate besides being a branch of the Legislature, is the Executive council of the President, and stands in intimate communion with him in regard to all our foreign diplomatic relations. Nothing, therefore, can be more proper than that all Executive sessions of the Senate, and all confidential communications relating to Treaties should be with closed doors and under the seal of secrecy. Hence the standing rule of the Senate (No. 38) requires that all confidential communications, made by the President of the United States to the Senate, shall be, by the members thereof, kept secret ; and all treaties, which may be laid before the Senate, shall also be kept secret until the Senate shall, by their resolution, take off the in-

junction of secrecy. And by the standing rule of the Senate (No 39) "all information or remarks touching or concerning the character and qualifications of any person nominated by the President to office, shall be kept secret." By the 40th rule of the Senate, "when acting on confidential or Executive business, the Senate shall be cleared of all persons, except the secretary, the principal or executive clerk, the serjeant at arms and door keeper and the assistant door keeper." By the 41st rule of the Senate, "The legislative proceedings, the executive proceedings, and the confidential legislative proceedings of the Senate shall be kept in separate and distinct books."

These rules were established under the power given to the Senate by the Constitution of the U. S. Art. 1. s. 5, "to determine the rules of its proceedings," and are therefore until repealed as obligatory as if they had been inserted in the Constitution itself; so that it is not only the privilege, but the duty of the Senate to hold its Executive sessions in secret. No odium therefore can attach to the Senate from the circumstance that the judgment for contempt was pronounced in secret session, upon a transaction which took place in secret session. It could not have been done otherwise. The offence must be punished in secret session, or go unpunished; leaving the Senate exposed to all sorts of insults in the discharge of their solemn constitutional duties.

After an anxious and careful consideration of the whole case, the court is unanimously of opinion, that the Senate of the United States has power, when acting in a case within its jurisdiction, to punish all contempts of its authority, and that the Prisoner, having been committed by the Senate for such a contempt, and being still held and detained for that cause, by their officer, this court has, upon the *Habeas Corpus*, no jurisdiction to enquire further into the cause of commitment, and must remand the prisoner.

Prisoner remanded.

☞ The preceding long but highly important decision has crowded out of the present number the "Abstracts of the decisions of the Supreme Court," and much other interesting matter.

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MEDICAL JURISPRUDENCE.—EFFECTS OF INTOXICATION.

The mental *status* produced by drunkenness is frequently determined by the testimony of physicians. But the effect of that state of mind, voluntarily produced, in relieving from responsibility for crime, is to be determined by the Courts. Sir William Blackstone quotes the language of Sir Edward Coke, who declares that “a drunkard who is *voluntarius daemon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it.” And Sir William adds, that “the common law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another.” Plow. 19. 4 Bl. 26. 1 Inst. 247. The effect of this severe rule of the common law is frequently to fix upon the accused the legal guilt of a crime of much greater enormity than he ever intended to commit. But the great value of the common law is that it is founded upon far reaching views of policy, which look beyond

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the justice of the particular case, for the purpose of protecting the higher interests of society. It seems to be conceded as a principle of the common law that a man who wilfully perpetrates an unlawful act is responsible for all its consequences. Hence, a man who accidentally kills another by discharging a gun at a sheep, or a domestic fowl, for the purpose of stealing it, is guilty of murder at common law, although his mind never in fact assented to the enormity of taking the life of a fellow being. On the same principle, it would seem that a man who voluntarily puts himself in a state of mind which causes him to take the life of another is guilty, by construction, of the common law crime of murder. The hardship of this rule has sometimes caused the scales of justice to vibrate in its application to capital cases. In 1819, Mr. Justice Holroyd, in *Rex v. Grindley*, under the influence of his feelings, held that "though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is whether an act was premeditated, or done only with a sudden heat and impulse, the fact of the party being intoxicated is a circumstance proper to be taken into consideration." *Lewis' Crim. Law*, 602. 1 *Spear's*, 384. This decision has doubtless had its influence elsewhere. The error of Mr. Justice Holroyd consisted in supposing that at *common law* it was always "a material question" in murder "whether the act was *premeditated*" or not. We have seen that *premeditated* killing was not always essential to constitute the crime; otherwise it never could have been held murder to kill a human being accidentally in the premeditated perpetration of a larceny. There is some reason to believe that subsequent reflection brought the mind of that enlightened judge to an acknowledgment of his error. In 1835, in the case of *Rex v. Carroll*, Mr. Justice Park, after citing the case of *Rex*

v. Grindley, decided by Mr. Justice Holroyd, remarked that "highly as I respect that late excellent judge, I differ from him, and my brother Littledale agrees with me. He once acted upon that case, but afterwards retracted his opinion, and there is no doubt that case is not law. I think that there would be no safety for human life if it were to be considered as law." 7 Car. and Payne, 145. 32 Eng. Com. Law, 471. Lewis' Crim. Law, 602, note.

Mr. Justice Story, in the *United States v. Drew*, took a distinction on the effect of intoxication which, on account of its humanity, has received general commendation. That learned judge held that insanity, of which the remote cause is habitual drunkenness, is an excuse for an act done by the party while so insane, *but not at the time under the influence of liquor*. The crime (to be punishable) must take place during a fit of intoxication, and be the immediate result of it, and not a remote consequence superinduced by the antecedent drunkenness of the party. In cases, therefore, of *delirium tremens* or *mania a potu*, the insanity excuses the act, *if the party be not intoxicated when it is committed.*" 5 Mason, 28. Am. Jurist, vol. 3, p. 5 to 30. *Burnet v. the State*, Martin & Yerger, 133. *Cornwell v. the State*, ib. 147. Lewis' Crim. Law, 602, note.

Thus stands the law on this question where the trial is for murder, as defined by the common law, uninfluenced by any statutory division into degrees. But the unreasonableness of fixing the penalty of death upon one whose whole guilt, so far as his mind was considered, consisted of an intention to steal, or the criminal folly of becoming intoxicated, induced many States of this Republic to enact statutes dividing murder into degrees, according to the attending circumstances.—By the act of 22 April, 1794, no crime whatever, thereafter committed (except murder of the first degree) was punishable with death. And "all murder which shall be perpetrated by

means of poison, or by lying in wait, or by *any other kind of wilful, deliberate and premeditated killing*, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree." By this act it is evident that the Legislature considered that the intention to commit either of the high crimes of *arson, rape, robbery or burglary* was to be regarded as equal in point of enormity to an intention to kill, and involved the perpetrator in the constructive guilt of wilful, deliberate and premeditated murder, if the death of a human being was caused by the perpetration or attempt to perpetrate either of the high crimes thus enumerated in the statute. But not so with the crime of larceny, drunkenness, or any other crime not enumerated. A death happening, *without an intention to kill*, in the perpetration of any of the non-enumerated offences, fell within the class of constructive murders, which, although punishable with death, *at common law*, was not thus punished *under the act of 1794*. It follows that, under the benign provisions of that act, any circumstance may be given in evidence to show that the mind of the prisoner was deprived of the power to form a design—to deliberate—to premeditate. To admit this defence is not to privilege one crime by another, but to show that the ingredients expressly required by the statute to constitute the *capital* crime did not exist, and that therefore the crime itself, to the degree alleged, could not have been committed. It is true that this defence should be admitted with great caution and examined by the jury with the most careful scrutiny. But it is certain that where it is satisfactorily shown that the mind of the accused, by reason of intoxication, or otherwise, was for the time so totally deranged as to be incapable of delib-

eration and premeditation, he cannot be guilty of a crime in which these operations of the mind are demanded by statute as essential in its constitution. The iron rule of the common law has nothing to do with such a case. The statute is imperative ; and no judge can lawfully deprive a prisoner of his life under the pretext of a *constructive* deliberation, where the mind was incapable of such an operation in fact. It is feared that some unfortunate prisoners have gone to the gallows for want of a proper explanation of the law in this respect. The judge, without due reflection, may occasionally adopt the language of the common law writers upon the effect of drunkenness, without noticing the material alteration produced by the statute. Such a course is perilous to the prisoner ; and, it seems to us, equally perilous to the peace of mind of a conscientious judge.

The first case which we have noticed in the books in which the alteration made by the act of 1794, in this respect, was distinctly placed before the jury, is the case of the *Com. v. Dunlap*, who was convicted of the murder of his wife in Lycoming county, in 1838. Judge Lewis, who presided on that occasion, in reference to the defence of insanity occasioned by intoxication, charged the jury as follows :

“To constitute murder of the first degree the statute expressly requires that the crime be “wilful, deliberate and premeditated.” Except in the case of murder which happens in consequence of actual or attempted arson, rape, robbery, or burglary, a deliberate intention to kill is the essential ingredient of murder of the first degree. Where this ingredient is absent ; where the mind, *from intoxication*, or any other cause, is deprived of its power to form a design, with deliberation and premeditation, the offence is stripped of the malignant feature required by the statute to place it on the list of capital crimes ; and

neither courts nor juries can lawfully dispense with what the act of Assembly requires." Nearly ten years afterwards the same judge, after the fullest consideration, repeated the same doctrine in the *Com. v. Haggerty*, who was tried and convicted of murder of the first degree in Lancaster, in January, 1847.—*Lewis' Crim. Law*, 405. These instructions, it is true, did not save the lives of the prisoners, but it is no doubt satisfactory to all parties that they enjoyed the advantage of having the law humanely, and, as is believed, correctly expounded.

In Virginia, where there is a statute dividing murder into degrees, like that of Pennsylvania, it is believed that a similar view of the law prevails. *Com. v. Jones*. 1 Leigh, 612.

In Tennessee, Mr. Justice Reese, in 1843, in delivering the opinion of the Supreme Court upon a similar statute, has explained the law on this interesting question in language so clear and forcible as neither to be misunderstood or refuted. In the case of *Swan v. the State*, 4 Humphreys, 136, the Judge makes the following remarks :

"The characteristic quality of murder of the first degree, and that which distinguishes it from murder in the second degree or any other homicide, is the existence at the time of the death of the assaulted, of a settled purpose and a fixed deliberate design on the part of the assailant that his assault should produce death. The length of time which the assailant deliberates on his intention is not material. Drunkenness is no excuse for or justification of crime. But although drunkenness in point of law constitutes no excuse or justification for crime, still when the nature and essence of a crime is made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental *status*? Is it one of self-possession favorable to the formation of a fixed purpose by deliberation and premeditation? Or did the act spring from existing passion, excited by inadequate provocation, acting it may be on a peculiar temperament, or upon one already excited by ardent spirits? In such case it matters not that the provocation was inadequate, or the spirits voluntarily drunk. The question is, did the act proceed from sudden passion, or from deliberation and premeditation? To regard the fact of intoxication as meriting consideration in

such a case, is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has in fact been committed. If the mental state required by law to constitute the crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by drunkenness, or such other cause, but has not in fact been committed."

We have thus drawn attention to the change in the law which the statutory division of murder into degrees necessarily produces, because many of the States have statutes of this character in operation. Our readers in Maine, New Hampshire, New Jersey, Michigan, Maryland, Virginia, Ohio, Tennessee, Alabama, and other States where similar statutes exist, will not, we trust, complain of the space occupied in this discussion. It should always be remembered, in cases of the kind under consideration, that the doctrine that a man "shall not be permitted to privilege one crime by another," applies not to cases expressly provided for by statute. The principle of the common law gives place to the omnipotence of legislative enactment. Were this not so, the statutory amelioration of the code would be abortive, and a man might still be hung in Pennsylvania, and in some other States for *accidentally* killing another when his intention was only to kill a fowl for the purpose of stealing it. The same principle which reduces the *unintentional* killing, in the perpetration of a larceny, to murder of the second degree, places in the same ameliorated category the act of killing by one whose mind, from extreme intoxication, was incapable of forming a murderous design.

DISTRICT COURT OF VAN BUREN CO., IOWA : MARCH TERM, 1848.

[BEFORE OLNEY, J.]

WOOD v. BOWMAN.

PHYSICIANS' DUTIES, LIABILITIES, OPINIONS, BOOKS.

A general undertaking to conduct an accouchement, calls for the exercise of all the skill usually possessed by accouchers; and a special agreement, express or implied, is necessary to restrict the liability to the accoucher's actual knowledge or mode of practice.

Medical books are not, but the opinions of experts are, competent evidence of the truths of medical science.

This was an action on the case against a physician for negligence in conducting the delivery of the plttfs. wife.

The *placenta* was allowed to remain partly detached from the *uterus*, accompanied with slight *hemorrhage*, for thirty-six hours, and was removed by a consulting physician then called in. *Puerperal fever* supervened, followed by permanent ill health. Physicians testified their opinions as to the propriety of the delay and its effect.

The defendant offered to prove that he was a *Botanical* physician, and that, according to the doctrines of that school, his treatment of the case was correct; and he proposed to read medical books in support of the practice. The plaintiff objected, and the evidence and books were ruled out. The Judge remarked, that the duties of the defendant were not to be measured by his own knowledge and skill, or his own particular mode of practice. Having undertaken, generally, to conduct the accouchement, he was bound to bring to his aid, and apply with care and diligence, all the knowledge and skill usually possessed by practitioners of that art, and which the exi-

gency of the case might require. A stipulation to limit his duties to a particular mode of treatment, could not be inferred, unless he were employed with at least a knowledge that he would pursue that mode. As to the books, they are not competent evidence of the truths of medical science. Those truths are *facts*, provable by the opinions of experts. But such opinions must be given in Court, under the sanction of an oath. Their soundness may then be tested by a cross-examination into the facts and reasonings on which they are based, and the ability and opportunity of the witness to form correct conclusions.—The written opinions contained in these books, have never passed this ordeal. It is sufficiently difficult to extract the truth from the various opinions of witnesses upon the particular facts of the case. To go to a medical library, and select the standard scientific truths, applicable to the particular case, from a wilderness of conflicting theories, concerning which these books are filled with ingenious and acrimonious controversies, is what a jury could never do.

The Court directed the jury to determine whether the *placenta* ought to have been sooner removed; whether ordinary skill and attention on the part of the defendant would have led him to that conclusion; and whether the delay caused or contributed to the sickness of the patient. If the evidence is insufficient to affirm these three propositions, the defendant is entitled to a verdict; if sufficient, the plaintiff is to recover such damages, as, in the discretion of the jury, guided by a sense of honest fairness, they shall think he ought to have for the cares, anxieties, and expenses of the sickness thus occasioned, for the loss of the society, counsel, and assistance of his wife, and for the temporary and permanent injury to his domestic comfort and happiness. *Verdict for Plaintiff.*

[5 West. L. J. 553.]

Supreme Court of Pennsylvania.

MIDDLE DISTRICT.—HARRISBURG, MAY, 1848.

Farmer v. Sedgwick.—A conditional bid at a Sheriff's sale is not obligatory upon the Sheriff; nor an absolute one which is merged in one conditional, if not revived subsequently. Per Burnside, J. Error to Dauphin Co.

Judgment reversed.

Seibert v. Swan.—Where the proprietor of two adjoining tracts of land through which ran a water course to his mill on the lower one, part of which was the natural bed of a small stream, and part of it a trench from a neighboring creek, conveyed the upper tract without expressly reserving the water right, to a party who has obstructed the trench, and cut off the supply of water from the creek, he may sustain an action, on the principle of an implied reservation. Per Gibson, C. J. Error to Berks Co.

Judgment reversed.

N. B. In this case Justices Rogers & Coulter dissented.

Fisher v. Longenecker.—The bringing of a suit before a Justice of the Peace and then directing the constable not to serve the writ, is but a non suit; and this cannot be regarded as a suit pending so as to be pleaded either in abatement or bar before another justice for the same cause of action. The plea of *former recovery* can be sustained only when the merits of the controversy have been passed on. Per Bell, J. Error to Dauphin Co.

Judgment reversed.

Daniels v. Fitch.—An apparent or collusive agreement between parties in the same business to exchange carriages for livery, so that each might have one black one, and prevent the public from being aware of the true relation between them, will not be enforced, but the real agreement will be ; so that replevin will lie to recover both. But when an apparent state of the ownership produced by the collusive acts, is made the means of deceiving third persons as to the ownership, and procure credit, then the apparent ownership will be enforced for protection of third persons. The law will not lend its aid to assist individuals to cheat others. Per Coulter J. Error to Dauphin Co.

Judgment affirmed.

Hale v. Fitch.—Hale was the bail on the replevin bond *supra*. The suit was sufficient notice to him that Fitch claimed the property in Daniels' possession. He did not suffer by the secret agreement; the bail was entered when the true state of the case was insisted on; and he must be held by the terms of his bond. Per Coulter, J. Error to Dauphin Co.

Judgment affirmed.

Skerratt v. The Commonwealth.—In this case, the decision in the case of Cohen v. The Commonwealth (6 Barr.) affirmed. Prothonotaries are liable to pay to the Commonwealth one-half the excess over \$1500, and cannot deduct the expenses of their offices before paying over. Per Rogers, J. Error to Dauphin Co.

Judgment affirmed.

Frederick v. Gilbert.—In the action for assault and battery, on the plea of *son assault demesne* and the general replication *de injuria*, &c., the deft. admits the averments in the declaration.

Under the plea of *son assault demesne*, the burden of proof lies on deft.; and the record of conviction and fine, is not admissible in mitigation of damages, though it would be under plea of not guilty. The replication *de injuria* puts in issue only the matter alleged in the plea. Per Burnside, J. Error to Dauphin Co.

Judgment affirmed.

Greenawalt v. Shannon.—On an appeal to the Court of Com. Pleas, after a reference to arbitrators and an award made, it is too late to move to quash the appeal from the justice, though if made before a trial on the merits, it would have prevailed. Per Burnside, J. Error to Dauphin Co.

Ehler v. Funk.—The endorsement of a note “without recourse” does not put the endorsee on his guard and lead him to suspect wrong between the maker and payee in the transaction, though it is not in the usual course of business. The negotiable quality is not thereby destroyed. Per Rogers, J. Error to Dauphin Co.

Judgment affirmed.

Keller et al v. Comth.—A trial between the same parties, when the merits are not disposed of, cannot be pleaded in bar to estop a recovery in another action; and the same follows when the cause of action is both entire and divisible, and a portion only is disposed of.

When an appropriation of payments is not made by the debtor, the creditor may make it, and if he neglects it, the law will make the application. Per Burnside, J. Error to Dauphin Co.

Welker v. Brobst.—On a plea of non est factum to a single bill, it is not competent for the plttf. to shew that the deft. has parted with his property for the avowed

purpose to prevent a recovery. The inquiry must be confined to the question of the execution. Per Burnside, J. Error to Dauphin Co.

Judgment reversed.

Neisly's Appeal.—The accounts of a guardian may be reviewed within the period prescribed by the statute, though the balance has been paid over to his successor, notwithstanding the *proviso* of the first section of the act of 1840. The proviso is, "that the act shall not extend to any cause where the balance found due shall have been actually paid and discharged by any Executor, Administrator or Guardian." This must be construed as contemplating a payment to the ward himself, and not a succeeding guardian. Per Bell, J. Coulter, J. dissenting. Error to Dauphin Co.

Judgment reversed.

Reem v. Duey.—In a suit by an administrator, his bail is a competent witness for him, though liable for costs, because a recovery would increase his liability by increasing the assets. Per Coulter, J. Error to Dauphin Co.

Beaver v. Filsom.—A verbal agreement to give the ground if the inhabitants of the neighborhood would build thereon a church, which is done, constitutes the donor a trustee of the congregation, and is sufficiently certain to be enforced. Such an agreement comes not within the statute of frauds. Per Rogers, J. Error to Franklin Co. Judgment affirmed.

Zart's Exr's v. Heart & Eyster.—Part payment within six years is constructive acknowledgment of the debt, and evidence of a new promise; and in case of joint indebtedness the payment of one is an acknowledgment by both, whenever it has been made during the joint responsibility,

or in other words, before it has been severed by the death of one of them. But when the joint liability has been severed by the death of one of the parties, nothing can be done, by his lawful representatives, or by the other party, to arrest the progress of the statute as to the other party. The rule is the same, whether the party sought to be charged by the acknowledgment or discharged by the statute, be principal or surety. But a payment under a responsibility which was exclusively several from the first, would stop the statute only as to the payor, and not as to a debtor bound for the same debt only by a separate instrument.

In this case the payments were made by the principal. The note on which suit was brought was joint as well as several, and the makers are still alive, so that the payments within six years take the case out of the statute. Per Gibson, C. J. Error to Franklin Co.

Judgment reversed.

Sweigart et al v. Richards.—The field notes and a corrected draft made by a deputy Surveyor in 1774, and proved to be in his hand writing with numerous warrants, are competent to be left to the jury to prove an ancient boundary, though they were not filed as official, but were found in private hands. Per Coulter, J. Error to Dauphin.

Philad. & Reading R. R. Co. v. Fisco.—A chartered railroad company is not liable for the burning of a barn caused by the emission of sparks from the locomotive, unless upon proof of negligence, malice or wilfulness on the part of the company, or its officers. Such companies pay for the right to use their property, as is contemplated, when the damages to property through which they pass are assessed. Consequently they have a right so to use them, and like others owning property, are liable only *ut supra*. Per Rogers, J. Error to Berks Co.

Judgment reversed.

Miller et al v. Match.—Where a power to sell and convey lands is conferred by a will upon the Executors, and one of them dies in the life time of the Testator, and another renounces, after taking the oath but before entering upon the trust, the surviving Executor may sell and convey a good title, although he has not taken the oath or received letters testamentary ; and this even after the time contemplated for the sale by the Testator. It is the will, not the Register, which gives power to sell lands. Per Bell, J. Error to Dauphin Co.

Judgment reversed.

Stanley's Appeal.—A release by a ward to a guardian, shortly after attaining full age, given in the dark and before emancipation from habits of confidence and control, is to be disregarded. Such release may properly be used when vouchers have been lost by lapse of time, but not to cover recent transactions.

Where one received money from an Executor to apply the interest for the maintenance of the Testator's widow, and to pay the principal to residuary legatees, at her death, he will be liable to have his ward's proportion charged in his Guardianship account : and though he received it as trustee, the parties ultimately entitled may waive a trustee account, and the trust being executed, treat him as the *prima facie* holder of the whole sum. Strictly speaking none but the personal representatives of the cestui qui trust could make him show how he had discharged his stewardship. A trustee account would only burden the sum with costs, while a guardianship account is equally convenient and effective.

The fund was invested in Schuylkill Bank stock in his own name. The fact that he retained power to make them his own, estops his Executor from denying that he purchased them in his own right ; and though the ward re-

quested to have the certificates of stock sent to her, she is not concluded. In a state of ignorance and doubt, nothing said by her could bind her. Per Gibson, C. J. Error to Dauphin Co.

Judgment affirmed.

Cake v. Lewis.—The guarantor of a note who has not paid the claim cannot prove it under the commission in bankruptcy, and consequently on a suit against him, the principal debtor is incompetent as a witness, as he will be personally liable to the guarantor. 2 Barr. 343. Per Bell, J. Error to Dauphin Co.

Shurtz v. Thomas.—When one entitled to dower joins as administratrix in making a deed, in pursuance of an order of the Court, to consummate articles of agreement made by the decedent in his life time, and the deed purported to convey not only all the estate which the vendor had in his life time; but “all the estate of the said Mary and Cornelius (the co-administrator) since his death,” the right of dower is not carried thereby. The admr’s were directed by the decree to deal not with their own property, but with the legal title of the vendor; and words like these are to be restrained to the business of the occasion, and no intendment is to be carried beyond it. The admr’s particular interests were not involved without special description. No one can believe plttf. meant to throw in her dower; and it would require strong terms to carry out an intention so opposite to her interests. And by no construction but a strained one could the clause in question be made to embrace any but the joint interests of the admr’s: and it does not appear they had any.

Nor can a deft. claim title paramount to plttfs. dower under a purchase at Sheriff’s sale on a judgment against the vendor, when his alienee whose equitable interest he

had acquired *had covenanted to apply a competent part of the purchase money to the payment of judgments by which the property was encumbered*, because such sale procured by the deft., and the purchase made by him, was not in good faith. And the widow by being made a party to the revival of that judgment is not estopped, because the purchaser ought to have paid the judgment himself. He had the money—and is in the predicament of a purchaser who knows it was actually paid.

Though the articles contained a covenant for an unexceptionable title, the deft. by accepting a conveyance which did not touch the plffs. dower as a satisfaction of the articles, is precluded from demanding any thing further. He might take less than the articles called for; and a conveyance from the admr's. had the same effect as a conveyance from the vendor would have had, without the joinder of the wife. Per Gibson, C. J. Error to Centre Co.

Judgment reversed.

N. B. In this case Rogers and Burnside, Justices, dissented.

Oliver & wife v. Hughes.—The deft. borrowed of the plfff. who was an ignorant and unlettered woman \$700, for which he gave his single bill, payable two years after date, with warrant of Att'y to confess judgment. This note afterwards was delivered by the plfff. to the deft. for the purpose of being entered, which he promised to do. He afterwards returned the note to plfff. and represented to her that he had confessed judgment, and had the same recorded, and that it was a lien on a brick house in the Borough of Harrisburg. The plfff. being ignorant and unlettered, and having confidence in his representations, allowed the deft. to keep the money without requiring payment or further security for the space of five years,

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when the deft. became insolvent whereby she lost her debt. For this fraud the plttf. brought an action of fraud in the nature of a writ of deceit, and the jury found as follows :

"That they find for the plttf. on the first count in the declaration, the sum of one thousand and eleven dollars and fifty cents damages with costs, if in the opinion of the Court the plttf. are entitled to recover of the deft. under his plea of bankruptcy, and if not we find for the deft. The jury also desire to say that the above verdict is rendered because we believe that the deft. failed to enter the judgment note in favor of the plttf., when entrusted to him for that purpose, on the records of the county, and securing its lien on the property of deft."

The Court below held the deft. to be discharged because the debt was provable before the commissioner of bankruptcy.

Rogers, J. The plttf. is not compelled, though she may do so if she pleases, to waive the tort and resort to the contract. But it cannot be denied that this is a tort and not proveable under the commission, as the damages are uncertain. The certificate of bankruptcy is no bar to this action. Error to Dauphin Co.

Judgment reversed and judgment for plttf.

NORTHERN DISTRICT.—SUNBURY, JULY, 1848.

Donnel v. Bellas.—A purchaser of a tract of unseated land, at Treasurer's sale for taxes, who for a period of 5 years, neglects to pay the taxes and costs, and to give a bond for the surplus, acquires no title by such purchase.

It is the duty of the purchaser, as soon as the bid is made and the hammer falls, to pay the taxes and costs,—and although the Treasurer does make a deed, and acknowledge it, delivery is essential to its validity.

The limitation of 5 years in the 3d section of the act

of 1804, is not a bar to pliffs. recovery (Dellas') in this case although suit was not brought within 5 years after the Treasurer's sale to Staples under whom Bonnel claimed, inasmuch as the title of Witman under whom Bellas claimed by virtue of a sale made by order of the Orphan's Court of Northumberland county, was never divested, or vested in Staples, the purchaser at Treasurer's sale. Per Burnside J. Error to Northumberland Co.

Baxter v. Dewall's Exr's.—Testator among other things devised as follows: "My Will is, that all the rest and residue of my estate shall be divided into 7 equal parts, among my children, Elizabeth, William, Henry, George, Magdalena, Sarah and Ann. My will is, that all my stock, chattels, merchandise and household furniture, shall be impartially appraised, and after such appraisal made, that the same shall be sold by my Executors, hereinafter named: my will is that my son George shall have my plantation, containing 269 acres, more or less, for which *he is to pay* \$2500, in the following payments," &c.

Held, that George was entitled to a share of the \$2500; that is what is meant by payment of the \$2500 to the legatees of whom he is one. Per Gibson, C. J. Error to Lycoming Co.

Stackhouse v. Reese & Pursel.—It is surely not error for a Court to tell a jury, that certain facts are powerful evidence to establish a particular proposition in relation to boundary, and as such worthy the attention of the jury.

If the Court has misled the jury, by inducing them to suppose there was no evidence to the contrary, when such evidence existed in the cause, and by such sinister collocation of sentences, negatived the idea of there being other evidence, worthy of their consideration, it would doubtless have been error. Per Coulter, J. Error to Columbia Co.

Elliot v. Acta.—The question at issue, arises under the 14th Section of the Act of 1836, relating to Executors. Where a tenant did not offer a literal compliance with the act, but proffered what was equivalent, namely, an acknowledgment of the estate of his immediate lessor, with an averment that it has expired by its own limitation, and that after the commencement of his lease, the title had vested in a purchaser at Sheriff's sale of the fee simple interest of the owner of the land of which the immediate lessor himself held by a demise for years, in virtue of which he has leased to the defts—

In an action of ejectment, a tenant under an expired lease will not be permitted to turn out those who were in possession under his own landlord, or his alienees, and will not be permitted to do so, in a landlord and tenant proceeding. Per Bell, J. Error to Bradford Co.

Tallmadge v. Jones.—It is a trite rule in equity, that if a creditor has in hands or power the means of payment, and voluntarily relinquishes it, or if he agree for a valuable consideration to give to the principal debtor further credit for a definite time, without the assent of the surety, the latter is discharged from his obligation, though judgments may have been recovered against both.

A mere volunteer, who undertakes to pay the debt of another without his request, and under no circumstances of compulsion, moral or legal, and who is compelled to pay the debt assumed by him, cannot call on the real debtor to reimburse him, except perhaps in equity thro' the medium of the original security. No man is permitted to thrust himself, unbidden, into a relation which may impose a new, or change an existing liability of another, so far at least as his rights are involved.

A stranger may, for a consideration, bind himself to pay the debts of another without his privilege or knowledge.

Generally, a principal debtor is not a good witness for a surety in an action against the latter ; not because he is liable to make good the amount that may be recovered against the surety, but that he is also answerable in the event of a recovery for the costs of the action. It is clear, however, he may be examined to any thing, tending to exonerate the surety, if he be not liable for costs, or is released from payment of them.

In this case, Burlingame was rightly admitted to testify. Against him, judgment had passed, which could in no wise be affected by a proceeding to try the sufficiency of a defence, peculiar to Jones, his alleged surety. *Per Bell, J.* Error to McKean Co.

Hinman v. Cramer.—The 2d Section of the Act of 1785, clearly and distinctly recognizes an entry, as one of the modes by which the owner of lands may toll the statute of limitations.

If A. enter on premises in B's name, but without any authority or command from B., but afterwards and before the time when the demise is laid to be made, B. consents to A's entry, such subsequent consent is sufficient.

Where an owner of land, though not resident upon it, by an agent, enters on the land, sub-divides it into lots, by actual survey and marking the lines and enters into a contract for the sale of some of the lots, and regularly paid the taxes, within 21 years, the running of the statute is barred. *Per Coulter, J.* Error to Bradford Co.

Roberts v. Holstead.—The plea of nul tiel record in a Sci. Fa. on a mortgage, is a nullity, as the Scire Facias is founded on the mortgage, and not on the registering of it.

Where the pleas are nul tiel record—no lien—payment with leave, &c., to a Sci. Fa. on mortgage, evidence intended as a defalcation cannot be received without notice.

The assignee or transferee of an obligation mentioned

in the mortgage, is a purchaser for a valuable consideration of all the securities of the assignor, and of all his remedies, and this though the assignee was not aware of the existence of the mortgage, at the time he purchased the note. Pending the interest thus acquired, it was not competent for the mortgagee to enter satisfaction.

If it do not appear that the whole of the mortgage money was due for a twelve month before the impetration of the Sci. Fa. it is the business of deft. to show the objection by way of answer to pliffs. action, as being a qualification of their prima facie right to sue.

Perhaps it was only pleadable in abatement. Per Bell, J. Error to Wyoming Co.

Chappel v. Row.—J. C., by deed conveyed to M. C., in fee simple, a tract of land, in which deed is the following clause: "J. C. reserves the use of the land to his father and mother, the possession during their lives, as a home and residence for them, and at their death, the said possession then to vest in said M. C. the grantee.

Rogers, J. The reservations operate by way of limitation, or condition subsequent. The grant is a fee, but the right of possession is not vested in grantee till death of father and mother. Error to Union Co.

Maynard v. Neckerniss, Indorsee of Allen.—Where the interest of a witness is equally balanced, he is competent. A party to a bill or note, strictly negotiable, and which has actually been negotiated, cannot be admitted to impeach it in the hands of a bona fide holder by any thing which attended its inception or attached upon it, before it left the hands of the injured parties.—But he may testify to facts which occurred subsequently to the negotiating of the instrument, affecting it in the hands of the holder, and tending to disprove his right to recover upon it.

The attachment execution, given by our statute, should, I think, be pleaded by a garnishee in bar (for the foundation of it, is a judgment) in a suit brought against him for the money. Per Bell, J. Error to Lycoming Co.

Richter's Exr's v. Penn township.—Township Auditors have a right to settle the accounts of a Treasurer of a school district, for the three years he had served as such, when no settlement had been made by him. If the Auditors for the prior years had audited his accounts, their settlements unappealed from would have been conclusive. Per Burnside, J. Error to Union Co.

Admr's of Hannah Bish v. Bish.—A widow, or the representatives of a deceased widow, cannot maintain an action of Account Render, against her sons, or their alienees, who, by deed, covenanted to support their mother, in consideration of land conveyed to them.

Account Render can only be maintained, on a contract, express or implied. There must also be privity between the parties, express or implied.

A widow may waive her right to dower. Per Coulter, J. Error to Wayne Co.

Drumheller, Adm'r of Ehler v. Mumaw.—Pltff. in Error appealed from an award of Arbitrators.—The oath was made before Hugh Fell, and is thus subscribed: "Sworn and subscribed before me, Decr. 6th, 1845. A. Bedford, Proth'y. By Hugh Fell."

The Court below quashed the appeal, on the ground that Hugh Fell had no authority to administer the oath, from any thing that appeared on the record. The Supreme Court, reinstated the appeal, it appearing on the record that the summons, a rule to take depositions the rule to choose arbitrators and rule of arbitration in this case, were all signed in the same way. Per Burnside, J. Error to Luzerne Co.

Bradford v. Potts.—In an action of Scire Facias on a mortgage, it lays on the deft. to show that the title he has accepted is positively bad. When the contract is executed it will not avail the deft. to shew that the title is doubtful.

When the vendee accepted a title and took his warranty, with full knowledge of the alledged adverse title, he shall not detain the purchase money, when his possession has not been disturbed. 3d Pa. R. 447. Per Burnside, J. Error to Bradford Co.

Williston v. Culkert.—An assessment of a tract of unseated land, by No. and name of warrantee, and adjoiners, but as 200 acres instead of 600 acres, is good, and a sale of the tract by the Treasurer for taxes, and it remaining 2 years and more unredeemed, will vest a good title in the purchaser for the whole tract, against the owner of the warrant, who had paid taxes on but 200 acres, with a knowledge of the quantity contained in the tract. Per Coulter, J. Error to Tioga Co.

Preston v. Kellam.—If parties were partners, and pltf. after dissolution, made out a full account of the partnership, and gave it to deft. who made no objection to the account, or the balance struck against him, for a year or more, he is to be considered as having assented to it and acquiesced in it, and there being no proof of errors in the account, pltf. may recover in this form of action.

Assumpsit will lie on a settled account. The essential feature of an action of Account Render, is that it closes an open account. Its circuitry should prevent its use in all cases, where the simple and equitable action of assumpsit, can reach the case. Per Rogers, J. Error to Wayne Co.

[The foregoing is extracted from the opinion of the Court below, which was adopted by the Supreme Court.]

Fitch v. Mass.—An intruder, who enters on surveyed land, which is unimproved, and claims to certain natural or artificial boundaries, plain and visible, is protected, in the purchase of 1754 and 1768, as if he had had his claim run round, and marked by a Surveyor, when his possession is unbroken, and he pays his taxes for the land he claims. Per Burnside, J. Error to Wyoming Co.

Cake, Anthony & Co. v. Olmstead.—Defendant was security for his son. He gave a note of one R. O. in satisfaction of the judgment, conditioned to pay in two yearly payments.—Execution to be stayed on the above judgment till default of payment. Court below held that debt. was not discharged by the agreement to stay the execution.

The entry by the Prothonotary, and the filing of a receipt, is not the kind of record which imports absolute verity.

An attorney at law, under his general power to collect a debt, has no authority to substitute another judgment. His client, may however, ratify such act; if he do so, it is binding. Per Burnside, J. Error to Wayne Co.

[The above is the language of the Court below—adopted by the Supreme Court.]

In appeal of Jno. L. Hodge, Ex'r of R. H. Rose, dec'd.—Under the Act of 29th March, 1832, Sect. 12, 13, the extent of the power of the Orphan's Court is to remove an Executor, only when he fails and neglects to comply with the order directing security.

The Act of 1846, which is entitled an act relative to the appointment of Trustees by the Orphan's Court, and for other purposes, was intended to enlarge the power of these Courts, relative to Trustees, Executors, Administrators or Guardians, in cases of waste or mismanage-

ment by them, *virtute officia*. The Orphan's Court is invested with power to dismiss all Executors, Administrators or Guardians of Estates, held by testamentary trust, referring plainly to them as Trustees by virtue of their respective offices, and their actings and doings as such.

It is only where they act as Trustees the section applies, and not, when, as here, in their ordinary capacity of Executors. Per Rogers, J. Error to Susquehanna Co.

Bank v. Cutler.—Notice to a corporator is not notice to the corporation, unless he were an organ of communication between it, and those who deal with it.

A director of a Bank having knowledge that a note was given to raise money for a special purpose, which if it failed was to be returned to the drawers, and was present when it was discounted, is not notice to the Bank. Per Curiam. Error to Luzerne Co.

Miller v. Miller.—Though every proprietor has a right to the reasonable use of the water running through his land, he cannot by the mere act of appropriation, diminish the quantity of water which ran through his neighbor's land, to the prejudice of his estate in point of value, although enough was still left to the neighbor for the purposes for which he had actually used the water. Per Bell, J. Error to Union Co.

Snyder v. Wagon seller.—The maker of a negotiable note is not a competent witness to prove that the note was drawn for the benefit of a firm, composed of the plff. (Wagon seller), and another partner and himself, and that it was endorsed by deft. for his particular accommodation, when there is no evidence that the note was taken, after it was over due. Per Curiam. Error to Union Co.

Dale v. Folmer's Exr's.—F. agreed by parol, that if D. would sell to G. a house and lot of ground, he would pay

the purchase money, or see it paid, by G. D. sold to G. who went into possession. This was held to be such a part execution of the contract as took the case out of the statute of frauds and perjuries.

There is a difference between a surety and a guarantor. If the time of payment, in case of a surety, be extended against the principal debtor, without consent of surety, the surety is discharged. But in the case of a guarantor, if the creditor satisfy the jury that extension of time has not injured him, plfff. will be entitled to recover. Per Rogers, J. Error to Northumberland Co.

Detts v. Fitzer.—When a Register's Court awards a feigned issue, and names the parties, the Common Pleas has no power to disturb it.

This Court will not reverse for an error that has done no harm. The acts and declarations of one legatee are not to be received in evidence in prejudice of the other legatees.

The fixing on parties to give form to the issue, is a matter of arbitrary arrangement, and those who have not an interest in the question to be tried, pay no costs. The real parties—those who have taken an active part in the contest, are sought out and compelled to pay, by a writ of attachment. Per Curiam. Error to Northumberland Co.

Road in Middle Creek and Union Townships.—The Court of Quarter Sessions ought to direct the width of the road immediately upon the confirmation of the report of viewers, and then the parties interested have but until the next regular Sessions to petition for a review.

The parties in opposition to the road, are not concluded by lapse of time, until a term has intervened after the width is ascertained.

According to some recent cases, the width of the road must be fixed, upon the return and confirmation of the report of the viewers. Per Bell, J. Error to Union Co.

Green v. Hallowell.—At September T. 1846, a rule was obtained to plead, and on the 26th of Dec'r. 1846, on motion, judgment against Robt. Green for \$121 25 for want of a plea. The rule of Court is "that a rule to make defence or plead at least 20 days before the next succeeding term, and on failure of the deft. so doing, the pl'tff. may in like manner, within the said 20 days, enter a second rule to make defence or plead," &c.

Held that pl'tff. had no right to a judgment until after his 2d rule.

Where a cause is referred to Arbitrators, and an award in favor of pl'tff. for a sum certain, from which defendant appeals, and he declines pleading, a judgment may be taken by default, in accordance with the rules of Court, for the amount of the award without a writ of inquiry. Per Burnside, J. Error to Union Co.

Overseers of Milton v. Overseers of Williamsport.—Wife gains a legal settlement by marriage, where the husband was legally settled at the time.

In cases of emergency relief must be afforded, even before an order of relief is obtained, and in such cases the township will be liable for the amount necessarily expended.

The moment Overseers of the Poor receive an order for the relief of a pauper, it is their duty to provide relief until the place of legal settlement is discovered.

Overseers of the Poor have no right to sell the keeping of a pauper to the lowest bidder; and if they do, it is indictable as a misdemeanor. Per Burnside, J. Error to Lycoming Co.

Wallis's Adm'r. v. Merrill's Ex'r.—Where a man takes and holds money, for whoever is the true owner, an action of assumpsit may be maintained against him under the rule that where one has money which *ex equo et bono belongs* to another he ought to refund, &c.

By our practice, the Courts will compel the real party interested in, or claiming the fund, to appear to the action, and take defence by way of interpleading, or be forever barred. Per Bell, J. Error to Union Co.

West B. Bk. v. Chester.—The case of Burger v. Hiestter, is a pregnant instance in which a judicial sale, under a judgment, recovered on one of several bonds secured by mortgage, was held to divest its lien, though some of the bonds were not then due, and proves that a mortgage may be swept away not only by a sale for part of the debt secured, the whole being due, but even when a portion of it is not then payable.

This rule is not varied, where the recovery is for the interest that has accrued, and not the principal.

The Court will also see, that all entitled to the fund are brought in. Per Bell, J. Error to Lycoming Co.

In re Shultz's Appeal.—Parol proof will not be received, that persons whose names are not on the record, and who claimed to have been substantive parties to a feigned issue, were parties.

A Court will undoubtedly look beyond the record for a beneficial party to fix him with costs, or to exclude him as a witness, or even to bind him by a judgment in ejectment, but he cannot be brought into view for any other purpose, or be allowed to gain an advantage from a verdict against another, who was a legal as well as an actual party.

Parties to the first issue are concluded by the verdict, in any subsequent one.

A judgment may be fraudulent against one judgment

creditor, under the statute 13 Eliz. ch. 5, and honest against other judgment creditors, where different parties, separately contest the same facts in several actions.

The last of three or more liens, in the order of their succession, being superior to the first, but inferior to the second, gains no practical advantage from its priority, because it couldn't be preferred to the first, without being preferred also to the second, to which it is subsequent.

When in the order of date, the judgment of S. stands first, and the judgment of T. and C. second, and the judgment of L. third. On the trial of a feigned issue at the instance of L. the judgment of S. was found to be collusive and fraudulent, and on the trial of another such issue at the instance of T. and C. it was found to be fair and valid. These judgments continue to stand, as they would have stood had there been no issue at all, and were just as much entitled to the residue of the money. *Per Gibson, C. J.* Error to Lycoming Co.

Aurandt v. Wilt.—If a person dies while his will is in a course of preparation, and before its completion, it cannot assume the character of a will; and it is the same if a person became so debilitated in mind as not to be able to comprehend the nature of the instrument he is required to execute. It must be completed in every respect, save signing, while his mind is in such a state as to enable him to understand whether his directions have been comprehended and faithfully reduced to writing.

If the testator, at the time the instrument was completed and ready for signing, was incapable from mental imbecility of understanding the nature and purport of the instrument he was required to execute, an opportunity must be given to have the will read and explained to him, which cannot be, if before it is completed and ready for signing, he becomes incapable of understanding and comprehending its contents.

It is only after the will is perfect in every respect, except signing, that the saving in the act can have any operation.

If it is proved that after that time he is prevented from signing by the extremity of his last sickness, or of requesting some person to sign it for him, it is to be considered his will, notwithstanding this defect.

The exertion of mind required to understand the instrument as prepared, or the attempt to sign it, may prostrate the testator in such a way as to bring the case within the saving of the statute. In such cases the will may be admitted to probate, without signing.

To bring the case within the exceptions of the statute, strict and stringent proof ought to be required of testator's inability to sign a will or direct it to be signed.

Evidence ought not to be received of improvements made on the property in dispute, after the controversy respecting it has commenced.

A. the son-in-law of B. being in possession of a tract of land, containing 145 acres, as his tenant, agreed by parol to purchase 45 acres undivided of the tract and paid the purchase money. B. gave the balance of the tract, 100 acres, to A. and wife during life, and afterwards to their child in fee. A. continued in possession and made valuable improvements on the land.

Held that the gift and sale were good. Per Rogers, J. Error to Union Co.

SHROEDER v. DECKER ET AL.

1. The certificate of a wife's separate examination and acknowledgment of a deed may be falsified by parol evidence of fraud or concealed duress.

2. The deed for a part of the property being executed while the wife was an infant is absolutely void ; and the deed for the residus is open to objections for fraud or duress.

GIBSON, Ch. J.—There was not even a plausible objection to the evidence proposed, except the supposed impolicy of allowing the certificate of a wife's separate examination to be falsified by parol evidence. Such evidence is undoubtedly attended with a greater or less degree of risk in every case ; but it is indispensable to the detection of fraud, even in a record against which the law allows of no direct averment. Our statutory provision for a wife's conveyance by joinder with her husband, and acknowledgment or separate examination, is a substitute for a fine by which alone the common law allowed her to part with her land ; and it is true, as we read it in Sheppard's Touchstone, p. 9, that " if there be any woman that hath a husband (and) that doth join with her husband in the conveyance, the judges or commissioners must take care that they do examine her whether she be willing, and do part with her right in the land willingly, or by compulsion of her husband ; for albeit she may be made to do it by compulsion of her husband, yet hath she no way to relieve herself from it when it is done." But it is said in Madd, Ch. 212, that if *fraud* were practised, equity would relieve against it, which is certainly true, for no separate examination can guard against that. The principle is no more than the rudimental one that fraud vitiates every assurance whether by matter of record or in pais ; and even had the conveyance in this instance been

by fine, it would have been open to impeachment on that ground. But as the equity side of our courts of law is not broad enough to admit of relief by bill, we are compelled to give effect to the principle by pleading or evidence, as the court below ought to have done. But we would deprive married women of all substantial protection, did we give to the separate examination of a judge, or justice of the peace, the conclusive effect of an examination by commissioners to levy a fine, which is much more private, careful and searching. Every one conversant with the subject knows the inutility of a separate examination under our statute even by the most careful, and how often the form of it is hurried over almost in the presence of the husband, or, as in the case before us dispensed with altogether, even where the magistrate is too conscientious to be satisfied with less than full and unreluctant acquiescence, the husband may take her to a less scrupulous one. The necessities of justice therefore demand that the transaction be open to objection, not only for fraud, but concealed duress; and the case presented is a rank compound of both. The deed for a part of the property being executed while the wife was an infant, is absolutely void; and the deed for the residue is open to objections as decisive. It was given to a tavern keeper partly in payment of a profligate husband's debt contracted in a course of drunkenness and debauchery; and it was thus procured. Means, the grantee, attended by his wife, a man called Dininger who had no proper concern with the business, and an inexperienced justice picked up by the way, repaired to the house of the husband while the wife was in the throes of child birth. Means, his wife, and Dininger, entered the sick woman's chamber, and met in the first instance with the repulse they had reason to expect. It was not till she had been badgered during two hours, and worn out by the importunity of her husband, as well as deceived

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with false assurances by the rest of the party of her husband's right and ability to redeem the land, that they worked her to their will. The justice was then called in, and having barely asked her in the presence of her husband, whether the instrument she had executed was her deed, signed the certificate which had been brought along for the occasion. In addition, the land was of much greater value than the price which was paid for it in worthless accounts and charges. If these circumstances are proved, particularly the crisis selected for the transaction, the instruments employed to bend her to their purpose, and the deception effected by their false assurances—they will show the existence of a conspiracy to strip her of her property by force or fraud, and the jury will have no more to do than find for the plaintiff all the land which had not been paid for to Means or his voluntary grantee, and all that may have been paid for with knowledge of the fraud. To do less, would disgrace the administration of justice.

Judgment reversed, and venire de novo awarded.

Supreme Court of Illinois.

RECENT DECISIONS IN ILLINOIS.

The following points were decided by the Supreme Court of Illinois, at the December Term, 1847, and the cases will appear in Gilman's Reports, vol. 4, now in press:

Woodford v. McClenchan, 85.—It is a well settled principle of law, that an agent, while acting within the legitimate sphere of his authority, can bind his principal, and do whatever is necessary to carry out and perfect the bu-

business of the agency. So, where one sold, as the agent of others, a clock, received a note for the payment,—which note was received and negotiated by them,—and gave a written warranty, it was held, that, nothing appearing to the contrary, his acts were within the scope of his authority.

Hood v. Moore, 99.—A sheriff is the agent of the law in the performance of his official duties, and not of the parties interested. He must follow the direction of his precept, that being his only authority. Any private arrangement between him and a debtor, without the sanction of the creditor, is illegal and not binding on the latter; and where a debtor enters into such an arrangement with a sheriff, and has parted with his property, his only remedy is against the sheriff to recover the value of the property so received by him.

Selby v. Hutchinson, 319.—It is not every partial neglect or refusal to comply with some of the terms of a contract by one party, which will entitle the other to abandon the contract at once. In order to justify an abandonment of it, and of the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default.

Sherman v. Gasset, 521.—It is a well settled rule, that the Courts of one country will not enforce either the criminal or penal laws of another; nor will they carry out or be guided by the laws of another, regulating the forms of actions, or the remedies provided for civil injuries.—But it is equally well settled, that in the construction of contracts, and in ascertaining whether they are valid, the law of the country where the contract was made, or to be performed, shall, in general, govern.

Sherman v. Gasset, 521.—The *lex loci* only governs in ascertaining whether a contract is valid and what the words of the contract mean. When the question is settled, that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the *lex loci* ceases its functions, and the *lex fori* steps in and determines the time, the mode and the extent of the remedy.

Benjamin v. McConnel, 536.—A seal but imports or furnishes evidence of a consideration, and, except in cases where a release is designed to effect a conveyance or transfer of real estate, or some interest in or concerning it, which can only pass by deed, it may be dispensed with.

Truett v. Wainwright, 418.—The setting aside of judgments, as well in the case where they were procured by the misconduct of the plaintiffs as where they were obtained by the unauthorized appearance of strangers, rests on the ground of fraud, such practises being regarded by Courts as fraudulent, whatever might have been the original intentions of the party.

Schuyler Co. v. Mercer Co., 20.—The word "may" means "must" or "shall," in cases where the public interest and rights are concerned, and where the public or third persons have a claim, *de jure*, that the power should be exercised.

Frink v. McClung, 569.—An interest which will render a witness incompetent must exist at the time when he is offered for examination, or when his deposition is taken.

An honorary obligation will not constitute a disqualifying interest in a witness.

Prather v. Vineyard, 40.—An agreement by two persons for the use and benefit of a third, upon which such third person may maintain an action against the party promising, is not such an undertaking to pay the debt of another as will bring it within the statute of frauds.

Delaney v. Burnett, 454.—The purchaser of a pre-emption right is regarded as the "legal representative" of the original claimant, under the Act of Congress granting such rights.

The construction of the term at common law, depends upon the intention manifested by the party using it, and it has not, therefore, always necessarily the same signification. Such intention is not to be gathered solely from the instrument itself, but in part from concomitant circumstances, the existing state of things, and the relative situation of the parties to be affected by it.

Truett v. Wainwright, 411.—A. being indebted to B. and being suddenly called away from his business, gave

to C., his general agent, a sheet of paper with his signature at the foot of it, for the purpose of being filled up with a letter of attorney to confess a judgment. He took it to the attorney who held the claim for collection, who wrote a letter of attorney over the signature and then suggested to the agent that he add a scroll to the name of his principal, that being the most usual mode of executing such papers. He complied with the suggestion and then delivered the paper to the attorney: *Held*, that the letter of attorney was sufficient, and that, although it was usual to affix a seal or scroll to such instruments, it was not necessary.



New Publications.

PENNSYLVANIA STATE REPORTS, containing cases adjudged in the Supreme Court during part of May Term, July Term, and part of September Term, 1847. Vol. 6. By Robert M. Barr, State Reporter. Philadelphia: T. & J. W. Johnson, Law Booksellers and Publishers. 1848.

This volume of Mr. Barr's Reports has made its appearance in the usual excellent style. It contains numerous decisions of deep interest to the legal profession. In *Hollister v. Hollister*, p. 451, we have an interesting opinion from **COULTER, J.**, in which it is held that the presence of the attorney of a party at the execution of his commission to take testimony renders the testimony so taken inadmissible—that although the domicile of the wife in general follows that of her husband, yet under the act of 18th April, 1843, a wife whose husband resides in Ohio may after one year's residence in Pennsylvania sustain a libel for divorce *a mensa et thoro* for abuse committed in this State, and that cohabitation after such abuse is no bar to the application. In *Dennison v. Gehring*, p. 402, we have an able opinion from **BELL, J.**, enforcing the principle that after a decree upon an appeal in equity and a remittitur, a bill of review for errors on the face of the record does not lie in the court below. In another highly interesting opinion from the same learned Justice, we have

a valuable principle affirmed in the case of *Purdy v. Powers*, p. 492, which will put an effectual stop to the misapplication of partnership assets to the discharge of the separate debts of the individual partners. In *Finn v. Commonwealth*, p. 462, the right of recaption and even rescue if without a breach of the peace is affirmed to exist against a constable, if the latter seized the property so resumed after the return day of his execution. In *Knight v. Abert*, p. 472, *Gibson*, Ch. J. in his usual brief and forcible style, announces the doctrine that no action lies in Pennsylvania for a trespass by cattle pasturing upon unenclosed woodland; but holds, at the same time, that the owner of such woodland is not bound to keep his premises in a convenient and safe condition for the pasturage of his neighbor's trespassing cattle; and he may therefore dig mine holes in it without liability to his neighbor for the value of cattle which kill themselves by falling into them. In *King v. Kline*, p. 319, it is held that if one cannot otherwise preserve his property (a herring hanging by the side of the house and within the enclosed yard) from the depredation of a neighbor's dog he may kill him (the dog, not the neighbor) when discovered in the act of abstraction.

Mr. Barr has performed his important labors as Reporter with his usual discretion and ability, and we commend the work to our professional brethren as well worthy their attention.

REPORTS OF CASES argued and determined in the court of chancery of the state of New York. By Oliver L. Barbour, counsellor at law. Vol. 2. New York; Banks, Gould & Co. 144 Nassau st. Albany; Gould Banks & Gould, 104 State st. 1848.

Nothing need be said of the mechanical execution of this volume.—We profess but little knowledge of calf and sheep—less of the quality and size of paper, whether fool's cap, medium, royal or super-royal, and still less of the size of type, whether diamond, brier, long primer or pica. It is sufficient to say that the work is published by Banks, Gould & Co. and that it was printed by G. M. Davidson, at Saratoga Springs, in his usual handsome style of doing things, in his line as a professor of "the art preservative of all arts." The book before us is a rich depository of equity learning. It contains some of the latest—perhaps the very last emanations from the mind of the late Chancellor Walworth. In *Cath. Lasher's case* p. 97, the right of the chancellor is affirmed to issue a new commission of lunacy where there is no doubt that the jury must have erred in finding that the party proceeded against was not of unsound mind.—

In *Partridge v. Menck*, p. 101, the power of the chancellor is maintained to prevent by injunction the pirating of trade marks, without regard to the question whether the complainant was the original inventor or proprietor of the article made by him. In *Waring v. Smyth et al.* p. 119 the effect of an alteration of an instrument of writing, by consent of the holder, after execution, is discussed, and almost the whole treasuries of the law poured out upon this interesting subject. In *Stuyvesant v. Hale et al.* it is held that where mortgaged premises are sold subsequent to the date of the mortgage, to different purchasers in parcels, such parcels upon a foreclosure of the mortgage are to be sold for the payment of the mortgage debt in the inverse order of their alienation; and that the same principle is applicable to subsequent incumbrances upon different portions of the mortgaged premises either by mortgage or judgment. This is in accordance with the decision of the Supreme Court of Pennsylvania in *Nailor v. Stanley*, 10 S. & R. 450 which was overruled in *Corporation v. Wallace*, 3 R. 109, and afterwards re-established in *Cowden's Estate*, 1 Barr, 268. In *Fitch v. Witbeck, et al.* p. 161, it is intimated that a surrogate is not authorized to make an order of sale of real estate of a decedent for the mere purpose of paying the administrators the amount of their claim for the expenses of administration, where there are no existing debts for which the devisees or heirs at law of the decedent are liable in respect to the real estate. In *Buchan v. Somer*, p. 165, it is held that the effect of the new provisions of the statute is to prevent the common law lien of a judgment from attaching at all upon the real estate of the debtor until the judgment has been actually docketed; and not merely to protect *bona fide* purchasers and incumbrancers who had no notice of the judgment.—In *Paddock v. Wells*, p. 331, it is held that relationship by consanguinity or affinity within the ninth degree is good cause of challenge to a juror; relationship by affinity is defined with great precision; and the effect of the death of the husband with, and without issue, and also the effect of the death of issue are treated of, and determined in a manner which renders the case highly interesting. But we have not space to notice the many questions of interest which are disposed of in this volume. The appendix contains a notice of the death and a sketch of the life of chancellor Kent, together with the proceedings of the Bar upon the departure of that estimable and enlightened father of the profession.

THE NEW LIBRARY OF LAW AND EQUITY, edited by Francis J. Troubat, Esq., of Phila., Hon. Ellis Lewis, of Lancaster, Wilson McCandless, Esq., of Pittsburg. April, 1848. Harrisburg, Pa: Printed and published by McKinley & Lescure.

The death of Mr. McKinley's partner Mr. Lescure, and other unavoidable circumstances, have delayed the publication of this valuable work beyond the usual time of delivery. The April number commences with "An analytical Digest of all the reported cases determined by the High Court of Admiralty of England, the Lords Commissioners of Appeal, in Prize cases, and (on questions of maritime and international law) by the Judicial Committee of the Privy Council; and also of the Common Law, Equity and Ecclesiastical Courts, and of the statutes applicable to the cases reported: with notes from the text writers and other authorities on maritime law, and the Scotch, Irish and American Reports: By William Tarn Pritchard, one of the Proctors of the Ecclesiastical and Admiralty Courts in Doctors' Commons." The rapid increase of our commerce, the great extent of our Foreign relations and the questions incidentally arising render this work a very desirable acquisition at the present time. It is a great mistake to suppose that works on the subjects here referred to are only valuable to persons residing on the sea-board. The Digest contains a large fund of useful knowledge, and as an index to point the seeker to the great authorities on admiralty and international law, it is of incalculable value as well to the politician and the statesman as to the members of the legal profession. It is a sufficient recommendation of the style in which the work has been re-printed, to say that it comes from the hands of McKinley & Lescure.

A DIGEST OF THE LAWS OF PENNSYLVANIA, from the 29d April, 1846, to the 11th April, 1848, with some older laws not included in the last edition of Purdon's Digest. By Frederick C. Brightly. Philadelphia: James Kay, junr., & Brother, 183½ Market Street. Pittsburg: Kay & Company. 1848.

This pamphlet is intended as a supplement to Purdon's Digest. It is believed to contain all the laws enacted since the publication of the seventh edition of Stroud's Purdon. The acts are arranged under appropriate heads, as in Purdon's Digest, and notes of decisions are given in proper places. The work is neatly printed on good paper. Those who have perused Mr. Brightly's valuable work on costs will need no recommendation of the judgment and fidelity with which the Digest is prepared.

ANNUAL REPORT OF THE COMMISSIONER OF PATENTS FOR THE YEAR 1847.

The report of the Hon. Edmund Burke, Commissioner of Patents, contains a highly interesting account of the new discoveries and improvements in agriculture and in the arts and sciences. Our people belong to the utilitarian school of philosophy. Mr. Burke does them justice in saying that while but little credit can be claimed for them in the advancement of the science of Chemistry in comparison with Germany, France, Sweden and England, yet they are pre-eminent in the application of Chemistry to the arts. The same remarks may be made in reference to every kind of philosophy. Our people deal but little in theories and abstractions.—Every principle is brought to the test of utility; and it is valued or not according to the degree in which it may be practically applied to the useful purposes of life. The *Gutta Percha* (pronounced *Pertsha*) promises to be extensively introduced into the various uses of society.

Mr. Burke announces a new invention designed to obviate the objection to the new method of manufacturing metallic pipe arising from the almost incredible amount of power required to force the cold metal out of the cylinder between the die and the core. The difficulty arises from withholding the pressure until the lead has "set," and then distributing the power over the whole body of lead in the cylinder; and the remedy consists in the application of the whole power to that particular portion of the metal intended to be forced into the die. Previous to the introduction of the method at present in use—say about the year 1834—we remember to have seen a gentleman at the shop of a mechanic for the purpose of getting a machine constructed, according to a draft exhibited, for the manufacture of lead pipe out of lead *reduced by heat to a fluid state*. It was constructed upon the principle of the atmospheric pump, its length of course diminished in proportion to the specific gravity of the fluid metal—and the metal was cooled in the die, *after it left the cylinder*, by means of a trough of cold water through which the die and core were extended. The metal at the discharging point was chilled and cooled by its passage through the water and was forced out by the pressure of the fluid entering into the die at the other end. We believe that no patent was ever taken out for this invention: but its design was to accomplish the result produced by the two other inventions which have been patented.

The report of Mr. Burke displays his usual ability. The binding gives the book a neat and tasty appearance, but, as we turned over the leaves, strange emotions arose, like those occasioned by the faint recollections of

something which has almost passed from the memory. At last we discovered that our sensations were produced by the near resemblance of the paper and printing to those of the "New England Primer," in which we learned our alphabet. It is not very creditable to the country that the public documents of 1848 should be printed in a style but little superior to that of the primer of 1777.

THE ARGUMENT LIST OF THE LAW ACADEMY OF PHILADELPHIA.

Session of 1848-9 Philadelphia: Printed for the Law Academy only.
(One hundred copies printed.)

CHARTER, Constitution and By-Laws of the Law Academy of Philadelphia. Philadelphia: Printed for the Law Academy only, (three hundred copies printed) 1848.

We have received the above pamphlets and looked through them with much interest. Our young friends of the Philadelphia Bar have reason to be thankful for the opportunity the Law Academy affords them to improve in Forensic accomplishments. We had occasion last year (6 Penn. Law. Jour. 576) to commend the neat and methodical arrangement of the matter and the care bestowed upon the preparation of the cases in the Argument List; these deserve the same commendation this year; they are certainly chosen with discrimination, and stated with neatness and accuracy. It also appears (Argument List pp. 7, 8) that a series of Lectures, ten in number, from several accomplished members of the Philadelphia Bar, are to be delivered before the Academy. It argues well for the coming generation of our profession in Philadelphia that the junior members and students are enabled to sustain in so flourishing a state an Institution of the character of this Law Academy, one well calculated to make accurate, sound, close reasoning lawyers. The Argument List is a fine specimen of both style and paper. The typographical execution of both these pamphlets entitles the artist to high commendation; but his modesty equals his merit, and, as he wears his visor down, the laws of chivalry forbid an attempt to raise it.

"THE NEW YORK LEGAL OBSERVER" has been discontinued, after an existence of six years and seven months. Our friend of the "Code Reporter," who officiates as necrologist on the occasion, ascribes its death to "natural causes."

REPORTS OF CASES argued and determined in the English Court of Chancery, with notes and references to both English and American decisions. By John A. Dunlap, Counsellor at Law. Vol. XIX, containing Phillips' chancery Reports, Vol. 1. 1841, 1847. New York: Published by Banks, Gould & Co. Law Booksellers, No. 144 Nassau St. and by Gould, Banks & Gould, No. 104 State st. Albany, 1848.

We have received this, the nineteenth volume of the English Chancery Reports, published by Messrs. Banks, Gould & Co. of New York, and the first volume Phillips' Reports containing the cases mostly during the time of Lord Lyndhurst from 1841 to 1847. These cases are exceedingly well reported; care has been bestowed in the arrangement, preparation and general disposition of the work. The reporter's statements are well made and the arguments of counsel are quite fully stated in such cases as *deserve* the printing of the points made and the cases cited. The opinions of Lord Lyndhurst have always commanded the attention and respect of the profession.

The notes and references to American Decisions are brief and apposite. The pages are not overloaded with cases and authorities to be found in every text-book and digest, as is too commonly the case with American annotations. A very commendable discrimination and care have been exercised in the selection and citation of new decisions by Mr. Dunlap.

"*The Code Reporter, a Journal for the Judge, the Lawyer and the Legislator*," is a new work published monthly and edited by JOHN TOWNSEND, Esq. at No. 3, Nassau st. New York. The new code of procedure adopted in that state has rendered such a publication highly necessary; and, judging from the character of the editor and from the manner in which he executes his duties, we have no doubt that the work will be found highly useful to the "Judge, the Lawyer and the Legislator." We observe a slight ambiguity in the *syllabus* of the case of Swift et al. v. De Witt, in p. 25, which we suppose arises from a "generous confidence" in a correspondent. The point decided is that, *where a demurrer to a complaint is for one or more of the six grounds, enumerated in the 122d section of the code*, it cannot be treated as a nullity, although it may have been frivolous. A demurrer upon any other grounds is not admissible under the new code, and may therefore be treated as a nullity by the plaintiff, who may enter judgment and issue execution.

The Hon. JOHN W. EDMUNDS, for whom we have a great personal regard and for whose abilities we entertain a very high respect, has, by request, favored the profession with an "Address on the Constitution and

Code of Procedure, and the modifications of the law effected thereby." The address, although hastily prepared, amid the pressure of high official duties as a justice of the Supreme Court, is highly creditable to the eminent jurist who delivered it, and will be an invaluable guide in the new and untrodden ground over which our brethren of New York are about to journey. It is published with very great neatness in pamphlet form at the office of the "Code Reporter" and is furnished gratuitously to every subscriber to that valuable periodical.

THE NEW YORK CODE OF PROCEDURE.—A great change has taken place in the practice and pleadings in civil actions in New York. The new system came into operation on the 1st of July, 1848. So far as regards the form of proceeding, all distinctions between *law* and *equity* and between the *forms of actions* are abolished. The science of special pleading, and the learning therein which the most eminent professors have acquired by long years of laborious study, are swept away as "needless distinctions, scholastic subtleties and dead forms which have disfigured and encumbered our jurisprudence." For declarations, bills, pleas, replications, rejoinders, surrejoinders, novel assignments, &c., we have nothing left but a simple statement of the *complaint*—an *answer* and a *replication*. Many of our most experienced brethren view this change with the most serious alarm. But they should remember that the change is only in the *forms of proceeding*. The *substance*—the great and eternal principles of justice as found in the decisions and in books of authority on Law and Equity remain unchanged. A plaintiff in sustaining what is now called his "*complaint*" must still bring his case within the ancient rules of *Law* or *Equity*, and if he relies upon what was formerly a *legal* cause of action he must show that his action could have been sustained in some one of the old forms. If his *complaint* is founded in equity he must show that the facts, as disclosed in evidence, would have supported a bill in Chancery. So with the defendant: He must show that his defence would have been available under the old system either at *law*, under some appropriate form of pleading, or in *equity* as a bar, or as the foundation for an injunction, or some other equitable relief. In the trial of these complaints a constant reference to the ancient principles of law and equity will still be necessary. The learning of the well read lawyer will still be useful; and by a firm adherence to the ancient doctrines, so far as the real rights of the parties are concerned, the hand of Vandalism may be stayed, and the new code may be made more subservient to the purposes of justice than the old system, under which, it must be admitted, that justice

was frequently entangled in nets of form. In the meantime, experience may point out defects, and the conservative tendency of the law will, through the means of liberal construction and enlightened legislation, by degrees, remedy imperfections as they shall be disclosed. This is certainly an age of progress, and it is but reasonable to give the new code a fair trial.

A similar change is promised in regard to the practice in criminal cases. The Hon. Lewis Cass, in his work on "France, its King, Court and Government," has denounced the present form of indictment as a "judicial mockery." It certainly is objectionable in failing entirely to give the defendant notice of the time, place, and many of the circumstances of the offence with which he is charged. "The *acte* of accusation of France," says Gen. Cass, "is a very different procedure. It contains a full narrative of all the circumstances leading to, attending, and necessarily following the alleged crime—not got up in dry technical language but related with perspicuity in the style which one would naturally use upon such an occasion."

The perspicuity of the narrative in the French "*acte* of accusation" must necessarily depend upon the ability of the officer charged with the duty of drawing it up. Some of these proceedings, which have fallen under our observation, are, verbose, tedious, and abounding in conjectures, not necessary to be either stated or proved. But it is highly probable that some improvement upon the present system might be adopted. It is certainly not very creditable to the age that under an indictment for an assault and battery on the 1st of January, 1848, a man may be suddenly called upon to defend himself against an offence committed on the 1st of July, 1847, and that many circumstances attending the transaction may be set forth in the indictment without the slightest regard to the facts of the case.

The New Code comes to us in an octavo volume so badly printed as to present a very unfavorable specimen of the present state of the art of printing. The title page is displayed in exceedingly bad taste; and the body of the work abounds in picks, monks, and friars. Other evidences of the most slovenly inattention to neatness are apparent. We counted no less than six *spaces* interspersed throughout the body of a single page, (87) which had been permitted to get above their proper position, and mingle their dark and unmeaning visages with the intelligent countenances of the letters. We turned to some of the old works, printed in the earlier age of the art to see how far the Albany printer had retrograded. Our *Galleria Giustinianæ*, printed at Rome in 1631, was executed with far greater neatness; and our *Ortus Sanitatis*, printed at Antwerp in 1517, held up its head in conscious superiority by the side of the New York "Code of Procedure."

THE *The trial of Wm. Freeman for the murder of Van Nest*, is a handsomely printed octavo volume containing upwards of 500 pages. Reported by Benjamin F. Hall, Counsellor at Law, and published, at Auburn, N. Y. by Derby, Miller & Co. The many interesting points decided, and the ability with which the doctrine of insanity was discussed and illustrated, by a post mortem examination of the accused, render the book a work of great value to the legal and medical profession.

SHERIFF'S SALES.

Whitacre v. Pratt.—Rule to set aside Sheriff's sale in the District Court of Philadelphia. In the case of *Whitacre v. Pratt*, on the 16th Sept. 1848, it was stated, *Per Curiam*:—"That inadequacy of price is not in itself a sufficient ground for setting aside a sale, but when it is very gross, the court will take advantage of any irregularity in the proceedings however slight. Where there is an alleged inadequacy but not very gross, security is required that a greater sum will be offered at a second sale: in other words, where a doubt may be suggested as to the fact of inadequacy, the offer of security that the property will bring a certain sum, much larger than it brought at the sale, will have decisive weight with the court in determining the question. We say this in explanation of the case of *Perceval v. Bryant* (7 Law Jour. 196,) the circumstances of which are not remembered; but the affidavit filed in that case alleges several irregularities; and certainly the court did not mean to decide that mere inadequacy of price, where the proceedings have all been strictly regular, is of itself a sufficient ground to set aside a sale even where a higher bid is offered to be secured."

John Vaneman for the use of Mary Parker v. Elizabeth and Jane Cooper.—In the District Court of Allegheny county, in the case of John Vaneman, for the use of Mary Parker v. Elizabeth and Jane Cooper, a Sheriff's sale was set aside after the acknowledgment of the deed but before its delivery to the purchaser, on the ground that after bidding a larger price for the property when first offered, it was struck down to the plaintiff in the execution at an adjourned sale for a less and grossly inadequate price. When the property was first set up the pltf. was the highest bidder at the price of \$310. Then the pltf. had the sale adjourned, and at the next bidding he became the purchaser at \$25. The opinion of Lowry, J. is long and interesting, and we hope to have room for it in some early number. He recognizes the practice in this state of requiring the party asking to set aside a sale, under certain circumstances, to bind himself to procure an increased price at the second sale.

Honorary Degrees.

It will be seen by the commencement proceedings of the PHILADELPHIA COLLEGE OF MEDICINE, that the honorary degree of M. D. has been conferred upon Judge ELLIS LEWIS, of Lancaster. This honor, so rarely bestowed out of the medical profession, has doubtless been conferred on the learned judge, in consequence of some very able decisions of his in medical jurisprudence. Among the graduates at the institution we see the name of John C. Calhoun, a son of the distinguished southern statesman.—*Phil. Bul.*


We perceive by the Lexington (Ky.) Atlas, of the 17th inst. that at the recent commencement of TRANSYLVANIA UNIVERSITY, which took place on the 16th inst. the Honorary Degree of LL. D. was conferred upon the Hon. ELLIS LEWIS, of this city. The Institution was founded in 1798, and is one of the most respectable institutions in America.

The degree conferred upon the President Judge of this District is but a just appreciation of his learning as a jurist, and is creditable to the discrimination of those charged with the duties of awarding collegiate honors.—*Lancaster Tribune.*

We notice that at CAMBRIDGE, on commencement day, (Aug. 23d) the degree of Doctor of Laws was conferred upon Henry Hallam, Esq. London; Hon. Joel Parker, Royall Professor in the Law School at Cambridge; Hon. Theron Metcalf, Judge of the Supreme Court of Massachusetts; Hon. Reuben Hyde Walworth, Chancellor of New York; Louis Agassiz, Esq. Professor of Zoology and Geology in the Lawrence Scientific School, Cambridge.

The degree of Bachelor of Laws was conferred in course upon thirty-two young gentlemen, graduates of the Dane Law School.—*Law. Rep.*

Erratum.—In the article headed "Carlisle Slave Riot," published in the September number, in 4th line from top of page 104, for "when" read "were."

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PROFESSIONAL CARDS.

The professional cards of our advertising friends are rapidly accumulating.—They will be found subjoined and on the cover.

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THE
AMERICAN LAW JOURNAL.

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NOVEMBER, 1848.  
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Discharge of Surety.

THE CASE OF PINTARD *v.* DAVIS,

Decided in the court of errors and appeals of New Jersey is an instance of the general closeness with which the common law doctrines are followed in that state. In this country in its different courts one technical rule after another of venerable antiquity and undoubted authority has been disregarded or forgotten till something, sometimes called American Jurisprudence, has gradually grown up to a great extent composed of exceptions to those rules. The certainty ordinarily attained by following ancient and well settled rules perhaps to some will seem to compensate for the advantage which might occasionally result from another course. This decision affirming the judgment of the Supreme Court in the same case, reported 1 Spencer, 205, saves that state from the anomalous doctrines established in New York by the cases of *Pain v. Packard*, 13 John. 174 and *King v. Baldwin*. 17 ib. 384.

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Pain v. Packard and **King v. Baldwin** have been selected by the author of the notes to the 2nd volume of **American Leading cases**, as the foundation in part of a very judicious annotation; but the article cannot fail to convince the intelligent reader, that the cases so prominently presented, are not only contrary to all former decisions, but contrary to the true principles of the contract of suretyship. The *error* introduced by **Pain v. Packard** (so styled by Cowen. J. in **Herrick v. Borst**, 4 Hill 656) seems to have become inveterate in that state, but it deserves little favor elsewhere. It was repudiated by chancellor Kent in **King v. Baldwin**, 2 John Ch. R. 554 but was re-established, in the same case on appeal, contrary to all English authority either at law or in equity, and to the dissatisfaction of the profession, by the casting vote of the President, a layman. PLATT, J. one of the justices of the Supreme Court who had joined in the decision in the case of **Pain v. Packard**, retracted his former opinion, because as he said, upon a more full and deliberate investigation he was convinced that judgment was erroneous. **Pintard v. Davis** adheres to the rule that in this absolute engagement on the part of the surety, the duty of active diligence lies upon him and not upon the creditor, and that he cannot shift this obligation from himself by a mere notice.

It is said in the opinion of the court below that "where a creditor gives time to the principal, a surety cannot avail himself of that defence unless it appears on the face of the instrument that he is such surety, and in that case his relief is in equity and not at law." Spencer 207. The dictum cannot be supported, but the cases cited show that it was a mere hasty expression and not an error the result of any real misapprehension of the rule. The rule is that relief must be in equity and not at law, at least in case of specialties, unless the suretyship appears on the

face of the instrument. The form of the security, said *Lord Loughborough*, in a passage very frequently cited and frequently misapprehended, forces these cases into equity. When bound jointly and severally the surety cannot aver by pleading that he is bound not as he appears on the face of the instrument but merely as surety. However the rule may have been questioned or disregarded in some of the courts of this country, no rule of the common law is better established in those of England. Pitman on surety 184, &c. Burge, 211, 212 and cases. See acc. *Sprigg v. the Bank of Mount Pleasant*, 10 Peters 257. The doctrine as yet remains untouched in New Jersey. Where from the want of equity process, equity principles are from necessity administered in common law courts through common law forms, pleas in contravention of this principle may be supported with great propriety; but they seem to be without support upon the strict principles of the common law. But undoubtedly whatever the form of the contract, in equity parol evidence is admissible to shew who is principal and who surety, and relief can there be granted when the circumstances of the case will warrant, untrammelled by the technical rules or forms of proceeding which so often restrain the action of common law courts.— The decisions, which have taken place in the courts of equity, in cases of this nature (said Abbott C. J. in *Davey v. Pendegrass* 5 B. and Ald. 187) have always, as I understand them, proceeded on the notion that at law, the thing prayed for could not be done.

But if the fact of suretyship appears on the face of the instrument, then the discharge of the surety by a binding contract may be a legal question and pleaded at law to an action on the instrument. Suppose (the case put by *Lord Loughborough* 2 Ves. Jr. 542) the party a surety by a proper bond at law *as surety*; as if a man is surety upon the face of the instrument for the debt of another payable

at a given day, if the obligee defeats the condition of the bond, he discharges the security. The principle is a legal principle. The surety is bound for a definite not an indefinite engagement.

But again, even here when the fact of suretyship does appear on the face of the instrument, the surety may, where the true boundaries of law and equity jurisdiction are strictly observed, be forced for relief into equity by the operation of another legal principle closely allied to the former. In the case of a specialty, no rule of law is better established than that such contract can only be altered or in some instances discharged by an instrument of equal force. Thus, at common law, it is clear that a subsequent parol, that is to say, written or verbal agreement not under seal, dispensing with or varying the time or mode of performance of an act covenanted to be done, cannot be pleaded in bar to an action on an instrument under seal, for non performance of the act in the manner thereby prescribed. *Broom's Leg. Max.* 408. A principle it must be observed, which does not really conflict, as has sometimes erroneously been supposed, (in one remarkable instance by Justice Washington, in *U. S. v. Howell*, 3 Wash. 620,) with another principle, that if the performance of the condition be rendered impossible by, or the breach result from an act of the obligee, undoubtedly he can maintain no action on the bond. Thus an agreement to give time, if by an instrument of equal dignity, may be pleaded at law to an action on a surety bond; but if it be by parol agreement merely, it would be no defence in an action on the bond and of course would be no defence at law on the part of the surety. There may indeed be such consideration for the agreement, as may induce a court of equity to direct that the party shall not proceed to enforce his remedy at law; but a parol agreement of this nature, upon sound common law principles, can never con-

trol the operation of such bond in a court at law. While it is held that a sealed instrument cannot be varied by a mere parol agreement, it must follow that such an agreement cannot be set up as a defence to an action against the surety on such bond, since as the legal operation of the contract remains the same against the principal, the surety cannot be allowed, at law, to plead that it is different.— The general doctrine in England is indeed clear and will be found well stated in 2nd Am. Lead. Cases, p. 151, &c. where and in some of the previous pages the principal authorities are cited. See also Pitman 184; ib. 231; Burge 212, &c. The doctrine has heretofore been supposed to be clear in New Jersey and there is nothing inconsistent with it in the case of Solomon v. Gregory, 4 Har. 112. The point was not before the court in that case, was not discussed, and the judges did not have it in their minds in the expression of the general principles there enumerated by them. But a doubt has been created by the subsequent case of the Morris Canal v. Van Vorst, not yet reported. This was an action against sureties on a cashier's bond.— The fact of suretyship appeared on the face of the bond. This defence, the extension of time by a parol agreement, was presented by a special notice or specification of defence under the general issue. The motion was argued before the whole bench prior to the retirement of the very learned and able late Chief Justice, but was not decided until after he had left the bench. The motion failed by the equal division of the court, two of the judges being in favor of the motion and two adverse. The Chief Justice having left the bench previous to its decision, of consequence took no part therein, but perhaps it is proper to say as is understood was the case, that he united in opinion with the two judges who were in favor of the motion to strike out, and his opinion may be cited in favor of the integrity of the common law doctrine in New Jersey.

It is said by the learned author of the valuable work already cited (2 Am. L. Cas. 157) whatever may be the true theory of the law on this subject, that it has been repeatedly declared by the courts of this country, that under our *present jurisprudence*, whatever will discharge a surety in equity, will discharge him at law. Such is practically the result of a great mass of decision in this country, though except in the courts of states where there is no separate equity process the principle has seldom if ever been openly enunciated when it has been first introduced. It would seem to be an instance of somewhat violent judicial legislation to announce and act upon such a principle in the state of New Jersey, when there is a well organized and separate equity court.

Another branch of the law of suretyship seems to deserve a few remarks. Nothing undoubtedly is better settled than that the surety in a bond for the faithful discharge of duty to another is not discharged because of the passive conduct of the obligee, there being no fraud or concealment. Mere delay, where the obligee does not disarm himself, will not discharge sureties; nor will neglect in examining the accounts of the person in his employment; nor neglect to give notice to the surety or to dismiss the principal. Pitman 196; Trust Navigation Co. v. Harley, 10 East. 84; Shepard v. Beecher, 2 P. Wms. 288.

If there be any thing in the condition of the bond requiring diligence on the part of the obligee, as suggested in *The state bank v. Chatwood*, 3 Halst. 28, certainly the liability of the surety would depend upon the performance by the obligee of any duty thus imposed upon him. So in case of a bond given (not to the government but to any private corporation or individual) where the law makes it the duty of the obligee to communicate to the surety or to dismiss the principal. If the contract for the fidelity of the person employed was entered into in contemplation of

any duty, thus imposed upon the obligee, it may well be supposed, in such case, that a failure on the part of the obligee to perform such duty or to exercise such diligence would operate to discharge the surety from liability for subsequent breaches. Opinion of Judge Le Grand, 7 Pa. Law Jour. for April 1848, p. 257. But the application of this principle must not be pressed too far. In general laches is not imputable to the government from the negligence of its officers. Statutory directions that agents shall account, be dismissed for defaults, &c. are for the security of the government and have repeatedly been held to constitute no part of the contract with the surety. On this ground the case of the People v. Janson, 7 John. 332, which ventures still occasionally to show its face in court, has been frequently overruled. U. S. v. Kirkpatrick, 9 Wheat. 720; U. S. v. Vanzandt, 11 ib. 184; U. S. v. Nicholl, 12 ib. 505; Dox v. the Postmaster General, 1 Pet. 318. The People v. Russel, 4 Wend. 570. In Dox v. The Postmaster General, the opinion of the court was delivered by Chief Justice Marshall, who after referring to two previous decisions already cited said: "These two cases seem to fix the principle, that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it created, as firmly as the decisions of this court can fix it."

It is further no defence by the sureties in an action upon the bond of a cashier or clerk of a banking or other corporation that there has been laches on the part of the company or its officers in examining the accounts of such cashier; though the by-laws of the company require periodical examination of such accounts, and although it is alleged that loss has occurred in consequence of this neglect. Such by-laws and provisions of company are for its own security and form no part of the contract with the sureties. Morris Canal v. Van Vorst. C. P. T.

Supreme Court of Illinois.

***John Lawrence, plaintiff in error, v. Josiah Lane, defendant
in error.***

ERROR TO PEORIA.

1. Where a party has paid money by compulsion under the judgment and process of a court of competent jurisdiction, he will not be compelled to pay the same a second time.

2. No court of Law, even with the assent of a debtor, has authority or power to appropriate the private property of one to the payment of another's debt.

3. Where a court has no jurisdiction over the person or property of an individual his interests cannot be affected by its judgment or decree.

4. The common practice in courts of chancery, upon the foreclosure of mortgages, is to decree a surrender of the possession and title papers by the mortgagor, and those claiming under him.

5. A person who acquires an interest in a suit, *pendente lite*, cannot be made a party defendant on the record, unless he personally assert his claim.

BILL IN CHANCERY to foreclose a mortgage, &c. filed in the Peoria Circuit Court by the defendant in error against the plaintiff in error. The case was heard upon the bill and answer before the Hon. John D. Caton, at the May term 1847, when the usual decree of foreclosure was rendered.

The substance of the bill and answer is stated by the Court in their opinion.

The opinion of the court was delivered by

PURPLE, J. On the 27th day of July, 1841, Lawrence, the plaintiff in error, executed to Josiah Lane defendant

in error, a mortgage upon certain lands in Peoria county, conditioned for the payment of four hundred and fifty dollars in ninety days from the date of the same. On the 12th day of October, A. D. 1843, Lane filed his bill in Chancery in the Circuit Court of said county to foreclose this mortgage. The cause was continued from term to term to October, 1844, when Lawrence appeared and filed his answer, in which he admits the execution of the mortgage as charged in the bill. He then proceeds to state, that on the 15th of August, 1842, Lewis Tappan and others commenced an attachment suit against one Alexander P. Lane, in the circuit court of said county of Peoria, which, on the following day, was served on him, (Lawrence,) as garnishee; that at the October term 1842, the plaintiffs in said attachment suit recovered a judgment against said Alexander P. Lane for \$2151.42; that interrogatories were filed to be answered by Lawrence touching his indebtedness to the said Alexander P. Lane, to which he made the following answer. "The said John Lawrence says, that he had no lands, tenements, goods, chattels, effects or estate of any kind in his possession or under his control, at the time of the service of the garnishee process, or at any time since; nor does he know of any person who is indebted to him, the said Lane.

"This respondent further says, that on or about the month of August, A. D. 1841, he purchased from Josiah Lane, the father of the said Alexander P. Lane, a tract of land for eight hundred dollars, and paid part down, and gave his promissory notes for four hundred and fifty dollars, one of which was for four hundred dollars, payable in three months from date, or in about that time, and the other for fifty dollars payable in good promissory notes on other persons; that the land purchased was purchased from Josiah Lane and the deed taken from him; but this respondent has no doubt, but that the said Alexander P.

Lane was the real *bona fide* owner of said land, and that the sale was made by him and for his benefit, and that the notes taken in his father's name were for his benefit, and that it was so done to keep his creditors from reaching it, and that the amount due upon the said notes is really and *bona fide* due to said Alexander P. Lane.

"This respondent further shows to the court, that the amount due from this respondent to said Lane now amounts to the sum of \$450.00, there having been payments made which leave that sum now due ;" that upon the filing of this answer, the court, on the 12th of October, 1842, entered a judgment against him as garnishee of said Alexander P. Lane for the amount of \$450.00, being the sum then due upon the notes and mortgage executed by him to Josiah Lane aforesaid; that on the 17th of November, 1842, an execution was issued upon this judgment, which, on the same day, was levied upon the premises described in complainant's mortgage, which, on the 22d of December, 1842, were sold to Elihu N. Powell and William F. Bryan for \$491.36; that on the 23d day of March, 1844, Powell and Bryan assigned their certificate of purchase to one David Shane, who, on the 23d day of September following, (the time of redemption having expired) received from the sheriff of Peoria county a deed for the premises so sold as aforesaid; that the said sum of 450.00 was all that was due from him to said Alexander P. Lane, at the time of the rendition of the said judgment upon the said garnishee process; and that said judgment was for the same money, the collection of which was sought to be enforced by the bill to foreclose the mortgage before mentioned.

The cause was set down for hearing upon bill and answer, and at the October term 1847, a decree was made, appointing a day for the payment of the money due upon the mortgage. which was ascertained by the court to

amount to the sum of \$582.55 ; and that in default thereof, that the mortgaged premises be sold by the Master in Chancery, and the money arising therefrom applied in payment of the sum due by the mortgage, and costs of the foreclosure, and the surplus, if any, retained by the Master, subject to the order of the Court ; that the defendant should be foreclosed of his equity of redemption, and that he, and all persons claiming under him, should surrender the possession of the mortgaged premises and title papers to the purchasers.

The counsel for the plaintiff in error contended: 1st, that David Shane should have been made a party defendant to the complainant's original bill, the answer of Lawrence disclosing that he had an interest which might be affected by the decree ; 2nd, that Lawrence, having been served with a garnishee process in the suit of Tappan v. Alexander P. Lane, and a judgment having been rendered against him for the amount due on the mortgage, the same is thereby satisfied ; and that having once paid the money, or the same having been made out of the mortgaged premises, he can not be compelled to pay it again, and that the complainant in the court below had no right to foreclose his said mortgage ; and 3rd, that there was error in that part of the decree, which enjoins the surrender of the possession of the premises, as against Lawrence, and those claiming under him.

This is certainly an anomalous proceeding, and presents a question, which, at the first view, would appear somewhat embarrassing. While on the one hand it cannot be questioned, that where a party has paid money by compulsion, under the judgment and process of a Court of competent jurisdiction, he will not be compelled to pay the same a second time ; yet, it is equally clear, that no court of law, even with the assent of a debtor, has authority or power to appropriate the private property of

one to the payment of another's debt. The answer of Lawrence in this case discloses these facts: that Josiah Lane had a mortgage against him for \$450: that, on being served with a garnishee process in the suit of Tappan and others against Alexander P. Lane, he admits in answer to interrogatories, that he owes that amount upon the mortgage, and states, without offering any reason for his opinion, that he believes that Alexander P. Lane is the equitable owner of the sum of money secured thereby; and permits a judgment to pass against him for that amount, and the land which had been mortgaged is sold on execution, and the proceeds applied in part payment of Tappan & Co's judgment against Alexander P. Lane; to all which proceedings, Josiah Lane is an entire stranger, having had no day in court, and no opportunity to contest or assert his rights; and when he seeks to foreclose his mortgage, he is, for the first time, met with an objection, which, when rendered into plain English, is that by the judgment of a court of law, his money has been taken and applied to the use of another person, because the mortgagor, his creditor, entertained the belief that he, the mortgagee, was not the equitable owner of the mortgage. The court is unanimously of opinion, that so far as the present defendant in error, Josiah Lane, is concerned, the proceedings in the attachment suit are wholly void; that the court neither had jurisdiction over his person, nor his property. No suit or proceeding whatever had been instituted, or was pending against him. It was a matter in which, if he had had actual notice of it, he would have no right to interfere, either by way of objection, interpleader, exception or appeal.

There is no principle of justice or law, which will thus deprive a man of his property without trial or notice. It is not to be presumed that the judgment upon the garnishee process, set out in the answer of the plaintiff here,

was rendered with a full knowledge of the facts. No Court would render such a judgment, unless there was some misconception of the circumstances of the case.

We take the answer of the plaintiff to be true, and from that answer we can come to no other conclusion, than that there was collusion between Tappan & Co. and the plaintiff here, to devise some means to make the defendant's money pay the debt of Alexander P. Lane. If Josiah Lane really was not, and Alexander P., in equity *was* the owner of this mortgage, it was not the place to contest or decide that question upon a garnishee process in an attachment suit between Tappan & Co. and Alexander P. Lane.

The cases referred to in support of the principle, that a person who has once been compelled to pay money, by the decree of a court of competent jurisdiction, shall not be compelled to pay the same again, do not meet this question. In all those cases, the proceedings were against the party whose interests were to be affected by the judgment or decree, and there was either actual or constructive notice given to the party, whose money or effects were to be appropriated, not in payment of another's, but of his own debt. They were contests between creditors of the same debtor, in which the garnishees, who owed the debtor, or had effects of his in their hands, had, upon a proceeding directly against the debtor under a judgment of a court of competent jurisdiction, been compelled to pay to one, and in which the courts very properly determined, that such payment, or a judgment without payment, would bar any subsequent claim against him for the same demand. Thus, in the case of *Holmes et al. v. Remsen et al.*, executors of Clason, 4 Johns. Ch. R. 460, one Mullet, who resided in England, became a bankrupt, and under the law of England, assigned his effects to commissioners. Clason, who resided in New York, was indebted to him at the time of his assignment. The agent of Cl-

son, residing in London, had money belonging to Clason in his hands, which, by process from the Lord Mayor's Court, was attached, and judgment entered against him, by which he was compelled to pay over the money to the assignees of Mullet. An attachment was issued in New York against the effects of Mullet, as an absent debtor, under the laws of that state, and the plaintiffs, being appointed trustees for the benefit of the creditors of Mullet, claimed of the executors of Clason, payment of the sum of money due from Clason to said Mullet. It was held, that Clason's executors having once been compelled, through their agent, by the judgment of a court of competent jurisdiction, to pay the money, the plaintiff's claim against them was barred.

The same principles and nothing father are repeated in 5 Johns. 101, 20 do 229, in a note in 4 Cowen, 521, and 13 Mass. 153.

Unless there is something outside of this case, which does not appear by the bill or answer, it is not easy to perceive how the plaintiff here is injured by this decree. The mortgaged premises have already been sold, and, as he asserts, purchased by the assignors of Shane, who has a deed from the sheriff under the sale which vests all his equity of redemption in said Shane; and as the decree only proceeds against the land, and those claiming under the mortgagor, to require them to surrender the possession, and does not in fact make him personally liable for the money due thereon, we cannot see from the record, that the decree can operate to his prejudice.

It is the common practice in the courts of chancery in this, and many other of the United States, upon the foreclosure of mortgages, to decree a surrender of the possession and title papers by the mortgagor, and those claiming under him. In this there was no error.


It is not necessary to decide whether David Shane,

would, under other circumstances, have had such an interest in the suit, as would have made it necessary to have made him a party defendant to the bill of foreclosure. If he had such an interest, he acquired that interest pending the litigation between these parties, and it is unnecessary to refer to authorities to show, that a party thus situated is not entitled, unless, at least, he asserts his claim himself, to be made a defendant on the record.

The decree of the circuit court is affirmed with costs.



CERTAINTY IN MEDICINE.

 **HON. NORMAN H. PURPLE.**—The opinion of the Supreme Court of Illinois in the case of *Lawrence v. Lane*, published in this number of the *Journal*, will be perused with interest by our Pennsylvania subscribers, as well on account of the intrinsic importance of the points decided as by reason of the high regard which is entertained in this quarter for the character and abilities of Mr. Justice Purple, who delivered the opinion. Judge Purple formerly practiced law in the Northern part of Pennsylvania. He emigrated to the West and is now a Supreme Judge of the State of Illinois. It is gratifying to the Old Keystone to enjoy the reflected light of her far off children.



Dr. Elisha Bartlett, Professor of the Theory and Practice of Medicine in Transylvania University, is the author of a book on the *Certainty of Medicine*. We have not received a copy of the work, but from the high character of the eminent author we have no doubt that the subject has been discussed with ability. The author closes his work with an eloquent and beautiful summary of the merits of the medical profession.

Supreme Court of Pennsylvania.

COM' TH. OF PENNA. ON THE SUGGESTION OF DAVID MEOONKEY,
ET AL. vs. WILLIAM ROGERS. (LATE SHERIFF.)

1. A judgment creditor who issues a *scire facias* to revive his judgment within five years, but after the real estate of the debtor was conveyed to another, and causes it to be served upon the judgment debtor and the purchaser as *terretenant* thereby continues the lien of his judgment if he prosecute his writ of *scire facias* with due diligence.

2. But if the real estate of the debtor be sold by the Sheriff before the judgment of revival be obtained the land is discharged from the lien of the judgment, and the creditor cannot proceed to judgment of revival against the land so discharged from the lien but must look to the proceeds of sale.

3. A judgment in favor of one firm against another firm where one of the partners is a member of both firms, may be sustained under the act of 14th April 1838 and is a lien on the separate real estate of such partner; but his separate estate cannot be seized until the accounts are taken and the equities settled between the parties.

4. A judgment against one partner, in a suit against two, without any service or return of *nihil habet*, &c. against the other is erroneous; but a *bona fide* payment of such judgment by the Sheriff, out of proceeds of land sold by him on which it was a lien, is a protection to the Sheriff in an action brought against him by the judgment debtor or his subsequent judgment creditors after a reversal of the judgment.

This cause was decided upon a writ of error to the Common Pleas of Chester county. The judgment of the court below was affirmed, the Supreme Court being equally divided. Mr. Justice Bell, who ruled the cause below before his appointment to the Supreme Court, did not sit in the case in the Supreme Court; but as his opinion as Prest. of the Common Pleas contains a full statement of

the facts and the questions decided and affirmed, we subjoin the following interesting portions of it.

BELL, President. The first question raised by the special verdict is, whether the defendant, as Sheriff, properly paid out of the fund in his hands, proceeding from the sale of the real estate of George W. Pennock, the amount of the judgment recovered by William & Alexander Mode against Moses and Jesse Coates, and revived by *scire facias* and judgment therein, rendered on the 22nd of April 1837? Land bound by the lien of this judgment was, in 1839, conveyed by Jesse Coates, one of the defendants therein, and his wife, to George W. Pennock, who continued to be the owner thereof, until it was, with other lands, sold by the defendant, as Sheriff, on the 28th of October, 1842. Before the expiration of the lien, to wit: on the 18th day of April, 1842, an alias *scire facias* for its further revival, was issued against Jesse Coates and Pennock, as *terre tenant*, which was served on both of the defendants, on the 22nd of the same month; and at May Term, following, a judgment for default of appearance, was taken against Coates, but Pennock, the tenant, causing an appearance to be entered for him, no judgment was signed, as against him, nor were any further proceedings had, up to the time of the sale of the land bound. Under these circumstances, did this judgment continue to be a lien on the land sold, in the hands of the *terre tenant*, up to the time of sale? If this question is to be answered in the affirmative, it is conceded the payment made by the Sheriff in satisfaction of the judgment was rightly made.

By the second section of the Act of 4 April 1798, no judgment is to continue a lien on the lands of the defendant, for a longer period than 5 years, unless the plaintiff shall, within that term, sue out a writ of *scire facias* to revive the same.

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By the 3rd sec. of the same act, such writs of *scire facias* are to be served on the *terre tenant* of the real estate bound by the judgment, and it has been determined that where land, as here, has been aliened by the defendant in the judgment, within the period of 5 years, and no *scire facias* served on the *terre tenant*, or notice given him of such writ, within that period, the lien of the judgment is gone as against him, and the land in his hands; and this, though the original defendant may have confessed a judgment of revival, within the statutory term, (*Clippenger v. Miller*, 1 P. R. 64; *Luke vs. Davidson* 3 P. R. 229.) But in the present case, the *terre tenant* was named in the writ of *scire facias*, and it was duly served on him. There can, therefore, be no complaint on the score of notice. But notwithstanding this, it is said that, as against subsequent encumbrancers, in order to continue the lien of the judgment, the *sci. fa.* must be prosecuted to judgment, although the language of the act of 1798, taken literally, would seem to contemplate a *revival* from the mere fact that the writ, prescribed by it, had been issued. On the authority of *Vitry vs. Dauci* (3 R. 9) this position may be conceded, with this qualification however, that where a defendant or *terre tenant*, appears, upon the return of the writ, the plaintiff will be entitled to a liberal share of indulgence as to time, within which to prosecute his suit to judgment. In such case the lien of the original judgment will not be lost, except for laches and neglect of reasonable pursuit, and a failure to obtain a judgment in the *sci. fa.* before the expiration of the five years will not of itself, defeat the lien. In the case decided a period of 7 years was permitted to elapse between the initiation of the process and its consummation, and this though the defendant did not appear.* This was justly held to be such negli-

*See also *Cowden v. Brady*, 8 S. & R. 505.

gence as postponed the party to subsequent mortgages and judgment creditors. But no such neglect is observable here. The *sci. fa.* was returnable to May Term and the land bound sold in October 1842. But one term elapsed in the interval, at which the Plaintiff, using the utmost diligence, under the rules and practice of the court, could not have forced a trial. Add to this that, pending the *sci. fa.* the process of execution against Pennock must have been progressing; and indeed it seems that one portion of his property was sold as early as July.

Now if, as has been decided, under the circumstances which obtained, a liberal indulgence is to be extended to the judgment creditor in prosecuting his suit for a revival to judgment, it cannot, I think, be said, with any show of reason, that up to the time of the sale of the land, this indulgence was exceeded. But it is said, it was the duty of the creditor to pursue his suit to judgment even after sale. But wherefore? The land was discharged by the judicial sale, and the creditor was bound to look to its proceeds as the fund from which he was to be paid. In the analagous case of a Mechanic's Lien, it was held, in *McLaughlin vs. Smith* (2 Wh. 122) that the lien creditor though bound to issue his *scire facias*, within a given time, cannot proceed to judgment of revival after the lien has been discharged by a sale of the land, and that he is not bound to prosecute to a judgment, merely for costs. The same doctrine is asserted in *Comth. vs. Gleim* (3 P. R. 417.) In this there is reason as well as authority. Nor, as was argued for the Plaintiff, was the Sheriff bound to keep the funds in hand, until the *sci. fa.* was brought to judgment, in the absence of notice or intimation from any one, judgment debtor or subsequent lien creditor, that the judgment in favor of Mode was contested. Indeed, no one but the defendant would have been permitted to take defence, except on the ground of collusion and fraud in the

concoction of the judgment, which is not suggested—and if *he* wished to resist the application of the proceeds of his land to its payment, he ought, in my opinion, to have given notice of a defence to the Sheriff, and pleaded to issue. Under the facts and circumstances of the case, it was as much, and more his duty to bring the case to issue by pleading to the SCI. FA. than it was the duty of the Plaintiff to call upon him to do so. He did not do so, nor does he now suggest any defence or ground of resistance to the judgment, and it is going too far to call upon us to presume the existence of such a defence, upon the suggestion of other creditors, who recovered their respective judgments, with an eye to and subordinate to this prior lien.

Nor is there any thing in the idea thrown out on the argument, that the Plaintiff, Mode, by signing a judgment by default against Coates, discharged Pennock's land of the lien, or in any way affected its liability. On the contrary, the constant and correct practice has been where two or more are sued and some appear, and others do not, to take judgment against those who fail to appear and then rule the others to issue; or you may, after issue joined, sign an interlocutory judgt. against those making default, and the verdict rendered on such issue, ascertains the amount due from all.*

I do not see therefore, that the defendant violated any legal propriety in paying, as Sheriff, out of the fund in his hands, the judgment in favor of Mr. Mode.

But another and more difficult question remains. Is the act of the Sheriff, in applying, a portion of the funds in his hands, arising from the sale of George W. Pennock's lands, in payment of the judgment recovered

* Marshall Gougler, 10 S. & R. 164, *Nelson v. Lloyd*, 9 W. 22, *Ridgely v. Dobson* 3 S. & W. 123.

against him by the firm of Swayne & Pennock, to be justified in this suit.

The judgment rendered by this Court, upon the verdict of a jury, in *Swayne & Pennock v. Pennock*, was reversed by the Supreme court, more than a year after its rendition, upon a point not made, or in any way brought to the notice of the court below. Of the defect in the record, upon which the judgment of reversal proceeded, as a legal objection to the validity of the judgment, every one interested in the estate bound by it, appears to have been profoundly ignorant, each and all regarding it as a good judgment and effective lien, at least up to April 1843, when the writ of error was sued out. Long before this, to wit, in November 1842, the defendant as Sheriff, had paid out the funds in his hands to the several lien creditors of George W. Pennock, and among the rest, in satisfaction of the judgment now in question. Then, and after the Sheriff had parted with the whole amount of the fund, came the reversal.

But if the judgment was a lien on the land of the defendant in it, at the time of the sale of that land by the Sheriff, he was right in paying it out of the proceeds at any time before reversal, and the subsequent reversal, gives no title to the defendant, or any one else, to call on the Sheriff, to repay, out of his own pocket, the amount disbursed by him, on the faith of a recorded judgment of the court of which he was the officer; especially in the absence of any notice that its validity was questioned, or of an intention to sue out a writ of error. Notwithstanding the strong language used, in reference to this judgment, by Mr. Justice Huston, when delivering the opinion of the court in *Swayne & Pennock*,* it must be held to have been merely irregular and voidable, and not void; but good and binding, as the judgment of a Court of

*6 W. & S. 241

competent jurisdiction, until reversed.* In such case I take the rule to be undoubted, except under extraordinary circumstances, the only remedy for the Plaintiff in error is by award of restitution against the Plaintiff in the execution, if he have received the money; and even this is in the discretion of the Court and will not be accorded, where equity and good conscience forbids it.† And why should it be otherwise? A judgment of a Court of competent jurisdiction, cannot be treated as a nullity, except perhaps, for fraud and collusion in the procurement of it, and to secure a fictitious debt. Every judgment, standing upon the records of a court of record, is to be treated as a subsisting one, however irregular upon its face.‡ If so, the Sheriff is bound to pay it, and may be subjected to a suit, if he do not. It is true he may pay the money into court, but this is seldom done, and never, in this district, unless notice be given of conflicting claims, or that the judgment creditor's right to receive, is to be in some way contested.§ Nay, the pendency of a writ of error will not, I conceive, bar the creditor of his right to receive the amount of his judgment; unless under peculiar circumstances,|| such, perhaps, as the insolvency of the creditor; and this exception would proceed upon the non-liability of the Sheriff in case of reversal. But were it otherwise, I take it to be settled that strangers to the judgment, as subsequent encumbrancers, cannot take advantage of such reversal by calling on the Sheriff, in a collateral action, to make good the sum paid in discharge of the reversed judgment. These can only impeach the judgment collaterally for

*Lewis vs. Smith, 2 S. & R. 142, 156. Martin vs. Rex, 6 S. & R. 296.

†Treatise on Sheriff, 46 Law Lib. 207-8, 255, 301; 2 Salk. 587; 2 Tidd's Prac. 933, 4, 5, 6; 2 Saund. 101; 2 Ba. Abr. (by Bou.) 389, T. Error 3; Fitzalder v. Lee, 2nd D. 205, S. O. 1 Y. 207, Baker v. Smith, 4 Y. 185; Capeller v. Cook, 8 S. & R. 296, Kirk v. Eaton 10 S. & R. 103; Willard v. Norris, 2 R. 63; Smith v. Sharp, 5 W. 292, 3.

‡Hayes vs. Shannon, 5 W. 548, Hazlett vs. Ford, 10 W. 103.

§Meeson's Estate, 4 W. 345; Leeds vs. Bender, 6 W. & S. 315.

||Gram's appeal, 4 W. 43.

fraud and collusion in its concoction to secure the payment of a fictitious debt, which might otherwise sweep away their means of payment.* Such creditors would not, I think, be for a moment listened to should they demand restitution to be awarded against a Sheriff or even against the Plaintiff in the execution, founded on a judgment reversed for irregularity.

There is, therefore, nothing springing from the mere fact of the reversal of the judgment recovered in *Swayne et al. vs. Pennock*, which can give the Plaintiff a title to recover any thing in this action.

This brings us, unembarassed by these considerations, to the main question was this judgment, before its reversal, a lien on the private and particular estate of George W. Pennock?

Notwithstanding the suit brought by *Swayne & Pennock* proceeded against George W. Pennock alone, his co-partner not being summoned, yet the judgment rendered must be taken as against the partnership of which George and Joel were the members, under which the partnership estate and effects, if any, might have been levied and sold. The fact that Joel was not summoned, did not make it less an action against the firm, and for a firm debt, than if both partners had been parties to the record.† The judgment recovered is, then in favor of one firm against another firm, one of the members of both being a plaintiff and, also, a defendant. This brings the case within the decision in *Tassey vs. Church*,‡ which ascribes to such a judgment an anomalous character, distinguishing it, in its legal attributes and affects, at least for some purposes, from the ordinary judgment at law,

**Hayes vs. Shannon, Hazlet vs. Ford*, (supra,) *Hauer's Appeal* 5 W. & S. 473, overruling, *Faust vs. Voneida*, 1 P. R. 250; *Steward v. Stocker*, 13 S. & R. 204.

†*Taylor vs. Henderson*, 17 S & R. 455.

‡6 W. & R. 465.

in actions *ex contractu*. If looking to that decision and giving it a candid construction, I was forced to the conclusion that it determines a judgment, recovered in an action given by the 1st Sec. of the Act of 14th April 1838, is not, for any purpose, a lien upon the separate real estate of the defendants, partners, but must be viewed, simply, as a means of reaching the partnership effects and nothing beyond, I should feel constrained to say the Plaintiffs are entitled to recover in this action ; however hardly such a recovery might operate against the defendant under all the circumstances that have place here. In such event, there would, in my apprehension, be found in the case, no equitable estoppel, springing from the silent acquiescence of the creditors in the distribution of the monies, or from want of notice that the right of the creditor firm to receive any part of the proceeds of sale would be contested ; sufficient to protect the Sheriff. Silence will not estop unless it be *fraudulent*, and it is never so where it results from *ignorance*, or the fact is equally within the knowledge of both parties.*

Nor am I inclined to think he would find any defence in the fact that the judgment was docketed against George W. Pennock alone, and the certificate of the Prothonotary delivered to the Sheriff, indicated it as a several judgment, for, to say nothing of actual notice at the time of the service of the summons, it is the duty of the Sheriff, who undertakes to distribute the fund raised by him on execution to look to the whole record of the several judgments. If he had done so in this instance, he would have learned the original form of the action. So too, in the contingency I have supposed, I should strongly doubt whether there was any such ratification of the acts of the Sheriff, in the acceptance of costs by the subsequent judgment creditors,

**Alexander v. Kerr*, 2 R. 89 ; *Robison v. Justice*, 2 P. R. 19 ; *Smith v. Black*, 9 S. & R. 146.

as would bind them ; or anything amounting to a positive agreement that the amount in the Sheriff's hands should be distributed in a particular way including the payment of the Swayne v. Pennock judgt. as was the case in Latimer's Estate (2 Ash. 524) Pennypacker's Est. C. P. of C. C. Dec. 1841, and Acinina vs. Perries (6 W. & S. 251). But let it be conceded, or shewn, that the judgment recovered by Swayne & Pennock, was a lien on the land of George W. Pennock, for any purpose, and the whole case assumes a different aspect.

Whether it was so or not, prior to its reversal is, notwithstanding *Tassey vs. Church*, I think, an open question. It is certain, the reasoning of the very learned Judge, who delivered the opinion of the Court in that case, unless very narrowly scanned in every part, would apparently lead to the conclusion that such a judgment was without the quality of lien upon the private estate of the individual partners ; for if there can be no levy by execution, it would seem an almost necessary corollary, there can be no lien. But since the argument of the case at bar, I have been favored with a pamphlet, printed and published under the sanction of Judge Grier, who decided the case below, containing a full report of *Tassey & Church* including the opinion of the Judge as well as the opinion of C. J. Gibson, as originally delivered. On consulting this, it will be found that Judge Grier, whose decision and the reasoning upon which it is based, was before, and affirmed by the Supreme Court, although he determined that the creditor firm could not then levy on the private estate of one of the debtor firm, expressly reserved the question whether the court would not order the judgment to remain as a security for such sum as Church might thereafter recover against *Tassey*, in an action of account render, or by bill in Chancery. But what is, perhaps, more to the purpose, in the opinion of the Supreme Court as

originally delivered by C. J. Gibson the concluding sentence, as we now have it on our reports, is omitted. That opinion, at first, ended thus, "We are of opinion, therefore, that the levy was properly set aside ; and that Tasse's *separate property cannot be touched by execution.*"—But, afterwards, as it would appear upon reflection, the sentence was added to, and it now reads, "Tasse's separate property cannot be seized *till the accounts are taken and the equities settled between the defendants.*" This super-added clause controls the generality of the previous reasoning and shews, I think, that the judgment may be considered as possessing a power beyond the mere settlement of the general question of indebtedness between firm and firm, and its supposed capacity to subject only the joint effects to seizure. If the separate property of a defendant partner cannot be seized till the accounts are settled between him and his partner plaintiff, it follows that, if upon such settlement, the former be found indebted to the latter, his separate estate may be seized for, at least, the amount so found due, and if this estate be in realty, why may it not be taken in execution by virtue of the judgment ? In a case like the present, there is no incongruity or impropriety legal or equitable, in holding the judgment to be a lien, standing as security for what shall be eventually found due, looking to the equities of all the parties. On the contrary, so to hold is in accordance with the general law which makes recorded judgments liens upon every interest which a defendant has in land, amounting to estate. Upon this point the provision of our Act of 1836 (copied in this particular from the old Act of 1810,) that every award, entered by the Prothonotary, shall have the effect of a judgment from the time of the entry thereof, *and shall be a lien on his (the defendant's) real estate, until reversed upon appeal, or otherwise satisfied according to law ;* is peculiarly applicable. No mischief

can result from giving full effect to this provision in cases like this. The defendant whose estate is bound, cannot complain, for he may either bring his action of account render, or, under the equitable powers now vested in our courts, proceed in equity, and if he be really not indebted, soon free himself of the encumbrance. In the mean while, the court in which the judgment is, having full power over their own process, upon proper application, will see that it is not used for the purposes of injustice. This was the course pursued in *Tassey and Church*, and the decision amounts to nothing more than that, upon a proper representation, the Court will restrain the Plaintiffs from having execution of their judgment against one of the debtor firm until it be ascertained they are equitably entitled to it.

On the other hand, to hold that the judgment was null as a lien against the separate estate of the defendants, or either of them, would, as it seems to me, frequently do injustice to the Plaintiff partners, by depriving them of a security which the law, ordinarily, offers to the diligent creditor.

If we are right in the opinion that the judgment recovered by *Swayne & Pennock*, was a lien on the lands of *George W. Pennock*, at the time of the Sheriff's Sale, it seems to me the law casts upon him and those who claim to stand in his shoes, a duty, in respect to it. *Prima facie*, and in the absence of notice of facts not appearing on the record, the avails of the sale were applicable to its discharge, in its order. If the money had been paid into Court, that tribunal, having all the parties before them, and hearing no objection or suggestion of difficulty, from any one, might, rightly, have directed the amount of this judgment to be paid to the Plaintiffs. Under such circumstances, I take it, the silence of the defendant and all others interested, might and would have been accepted

as a confession that this amount was justly due to the plaintiff firm, from the owner of the land sold. The course pursued in *Tassey v. Church* shews this. There, after the District Court, on its equity side, had entertained *Tassey's* bill, praying an account, the Plaintiff issued an execution on the law side of the Court, but this execution was not interfered with until *Tassey* came in and filed a suggestion that *Church*, one of the Plaintiffs, was the same *Church* named defendant. Whereupon, on motion, the Court set the execution aside, for the reason they had before given that, until a settlement of the accounts, there could be no recourse to the separate property of the partner. In the absence of any intimation or motion upon the part of the defendant or his creditors, it would be no part of the duty of the Court, to order the parties to bring an action of account render, to direct them to go into Chancery or to award an issue to try the state of the accounts between them.

On the whole case, as presented by the Special Verdict, I am of the opinion the plaintiffs are not entitled to recover, and therefore direct judgment to be entered for the defendant.

Judgment affirmed in the Supreme Court at its last sittings in Philadelphia.

Lewis & Smith for Pltffs. in the Common Pleas and Haines & Pennepacker for Deft.

Lewis & Meredith for Pltffs. in Error in the Supreme Court and Pennepacker and T. Sergeant for Deft. in Error.

ABSTRACTS OF DECISIONS OF THE SUPREME COURT OF PENNA.
WESTERN DISTRICT. OCTOBER TERM, 1848.

Hayes v. Heidelberg, et al.—A Sheriff's Sale of an intestate's real estate to one of the administrators, without the payment of the purchase money, is fraudulent and void, although intended to pass the title for the purpose of re-selling the property to the best advantage and after paying the debts of the estate save any surplus for the heirs.

Such a sale is not ratified by a subsequent purchase of a portion of the land made by one of the creditors, merely as the agent of a stranger, (the proceeds having been credited not to the trustee but to the administrators generally) but such creditor after obtaining judgment may proceed to sell the land under it and purchase it himself. Nor will the knowledge by the purchaser under such Sheriff's Vendee of the fact of such credit when it was made be a recognition on his part of such trust.

Such a sale to be valid, must be approved by all the lien creditors, otherwise any one of them may proceed to sell under his lien, and thereby nullify the former sale and intended trust. Per Bell, J.

The case of *Payne v. Craft*, (7 W. & S. 450) confirmed.

Dale v. Medcalf.—A sale of real estate, made in January, 1841, on a fi. fa. *after the return day* of the writ, under the Act of 10th of June 1836, sec. 45, which only authorized such a sale to be made before the return day, is not cured by the Act of 16th April, 1845, (Dunlop 950) which latter Act is unconstitutional. Per Burnside, J.

Sinnett v. Johnson's admr's.—Where testimony is offered some of which is competent and some incompetent, the court may reject the whole and are not bound to sift out what is relevant. Per Rogers, J.

Champlin v. Williams.—If several persons buy land as tenants in common, whether the title be made to all or to one in trust for the rest, and one of them is compelled in default of the rest to pay a mortgage which all were equally bound to pay, the advancing owner may protect himself by taking an assignment of the mortgage and enforce it to reimburse himself. Per Coulter, J.

Dayton v. Gunneson, adm'r. of Tross.—An absolute promise for a valuable consideration to pay a debt for which the promisee is responsible may be sued without evidence that the promisee had been obliged to pay the debt. Such promise is essentially different from the case of a surety, who though bound to pay, cannot sue his principal without actual payment. Per Bell, J.

Lackey vs. Mercer County.—Taxes paid under a void assessment, being on the property of a revolutionary officer, cannot be recovered back if paid without distress and sale or protest. The remedy against such assessment, &c. was appeal, and the actual settler or improver, having an interest in the "*betterments*" is equally bound by such voluntary payment. Per Gibson, C. J.

Lowry v. Coulter.—The confession of a judgment preferring a creditor not present nor otherwise actually accepting it, and the issuing an execution at the debtor's request sweeping all his personal property from other creditors, is one mode of legal preference good at common law and unimpeached by the statute of Eliz. Such preference does not establish a legal conclusion of fraud, nor legal presumption that the debt was fictitious.

A defendant in an execution may dispense with the Sheriff's taking actual possession of his goods when levied upon, as between himself and the officer, but such waiver will not bind other creditors who may levy upon goods not actually seized upon or within his view, control or power.

An order "to proceed no further" directed to the Sheriff will postpone the lien of a levy whether it proceed from plaintiff or defendant with plaintiff's permission.

An unauthorized amendment of a Sheriff's return is void, and the extent of the authority to amend is to be measured by the facts spread forth in the affidavit grounding the motion and order to amend.

A Sheriff's return is evidence of facts legitimately set forth in it, only in the cause in which it is made. Of facts incidentally in question in a contest with a third party, it is only *prima facie* evidence. Of facts introduced into it by amendment without leave, it is no evidence at all.

Skinner v. Gulliford.—One who has held a note as bearer and negotiated it without indorsement is not such a party to it as is incompetent within the rule in *Walton v. Shelly*. Per Gibson, C. J.

Evans v. Evans.—Two brothers were seized under the will of their father, as tenants in common in fee, of two undivided third parts of certain real estate, and under the will of their mother of a fee simple, determinable at the death of either brother without issue living at such death with an executory devise over to the survivor upon the happening of the contingency in the remaining third. One of the brothers died without issue leaving a widow and his brother her co-tenant, his heir at law.

The widow of the deceased brother may maintain dower at common law against the co-tenant of her husband.

She is dowable also of the estate determined by the death of her husband without issue living at his death.

Bank United States vs. Patterson.—The proceeds of real estate arising from premises delivered to a judgment creditor under the 3d§ of the act of 13th October 1840 are not appropriable to a mortgage the first lien on the premises, but to the judgment creditor.

Dodds v. Dodds.—A confession of judgment in Ejectment made by counsel against the instructions and personal protest in open court of his client, cannot be impeached by depositions in a court of error, but such a judgment entered on the docket by consent of attorneys but not signed by the parties is merely a parol agreement within the the statute of frauds and will not affect the freehold. The authority of an attorney at law does not extend to bargain away his client's land.

Torrence v. Comth.—On an indictment for forcible entry and detainer, it is error to award restitution, if no estate or interest in the premises, but merely a peaceable possession be set forth, but this court having power to mould the sentence, the judgment is reversed only as to such award and affirmed as to the costs. Per Burnside, J.

Smith & Greenwood v. Elcott.—A verdict in a former case of nuisance may be given in evidence in an action for its continuance under the plea of not guilty but it is not an estoppel, as it would be if pleaded.

Such a verdict if set forth in the narr. in case of continuance, is conclusive of the plaintiff's right, and evidence of the damages to the time of the first suit, and it is only requisite to prove the continuance.

The defendant in such suit for continuance is not protected by shewing that the nuisance was created originally on lands in the hands of a stranger and that he could not enter to abate it, without committing a trespass.

Heaton v. Findlay.—The rule that the right of property in a chattle severed from the freehold cannot be determined in Replevin or other transitory action obtains only when the ownership of the article severed is to be tested by the trial of title.

Where the sale of a fixture is bona fide and its severance from the freehold is total and intended to be lasting and it is removed from the incumbered premises, it is disencumbered of the lien of a judgment.

Admissions of a judgment creditor who afterwards became the purchaser at Sheriff's sale of the land that the fixture had been severed and sold, are not binding on such purchaser under a sale on the process of another judgment creditor. It has not been the practice in this state to name the witnesses in the rule, or the interrogatories on the commission to take testimony out of the state; for cause shown, the court will direct the names to be furnished. Per Bell, J.

Ambler & Wife v. Beares & Weaver.—A tenant for years is liable to a stranger for any injury suffered by the latter from the premises being out of repair. Whether between themselves, either landlord or tenant be bound to repair.

In the absence of any contract the tenant is bound to keep leased premises in repair. Per Rogers, J.

Oriel v. McClure & Whitaker.—A judgment paid by a surety, whether voluntarily or by execution, will be ordered for his use, in preference to a subsequent lien creditor, although the Sheriff had returned the execution issued on said judgment "money made." Per Bell, J.

Simpson v. Stackhouse.—The presumption of law that an alteration in an obligation is a legitimate part of it until the contrary appears does not extend to negotiable securities. The holder of commercial paper is bound to shew

that any apparent alteration of its face was made under circumstances not affecting its validity. Per Gibson, C. J.

Coleman v. Carpenter.—A presentment for payment and notice of non-payment made on the last day of grace of a promissory note is in proper time, nor is there any distinction in this respect between foreign and inland bills. Suit cannot however be brought thereon until the next day. Per Gibson, C. J.

Elmes v. Elmes.—An appeal from a decree of divorce, taken on the last day of the year allowed for appeal, dismissed and decree affirmed on the ground that the woman had been married nine months after the decree, without objection from the first husband, and since the appeal had a child by the second, the court regarding the appeal as actuated by merely vindictive motives. Per Coulter, J.

Forsyth & Co. v. Walker & Co.—When a forwarding merchant altered the marks on goods consigned to him from "T. F." to "T. Flanagan" and in consequence thereof they were seized and sold as the property of said Flanagan (not being the real owner) and thus lost, the forwarder is responsible. Per Rogers, J.

McKee v. Bartley & Brothers.—Narr. averring that "defendants contracted to make & deliver to plaintiffs a certain wagon for a sum then mentioned and agreed to between them within four weeks from and after said contract" sustained as setting forth a sufficient consideration. Per Bell, J.

Graff v. Bloomer.—A contract to deliver merchandize at the city of Pittsburgh is not performed by its delivery at the city of Allegheny, although the aqueduct forming part of the canal and the communication between those cities was broken down, some months before the date of the bill of lading. Per Bell, J.

DIGESTED FROM THE NEW YORK CODE REPORTER.

Supreme Court of New York.

SEPTEMBER SPE. TERM, 1848.

BEFORE MR. JUSTICE EDMONDS.

Diblee v. Mason.—In an action to recover the price of goods sold and delivered, and work done, the summons stated that the plaintiff would apply to the Court on a specified day for the relief demanded by the complaint. On motion for judgment for want of an answer.

HELD—*That the summons was in the wrong form, and that the motion for judgment must be denied.*

That the mistake in the form of the summons was not within sec. 145 of the Code.

That sec. 145 of the Code applies only to mistakes in "pleading" and not to "process."

That although the Court may have power to amend the process, it could only be done on a motion therefor.

Dickerson v. Beardsley & Another.—*Time to answer after Amendment.* After service of summons and complaint, plaintiff served an amended complaint, and at the end of 20 days from the time of the service of the amended complaint, plaintiff signed judgment. On motion to set aside the judgment, *Held*, that the defendant had 20 days from the service of the amended complaint to answer or demur thereto.

Lee and others v. Heirberger.—*Sec. 249 of the Code.*—On an application for an order under Sec. 249 of the Code.

HELD—*That an affidavit following the alternative wording of the statute is not sufficient.*

Brandon v. McCann and others.—The Code does not dispense with the necessity of filing a notice of lis pendens in mortgage cases.

Murray and Hilton for plttf.

Voght v. Shave and others.—In an action in the nature of a bill of interpleader where judgment is taken by defendant, the only costs that can be awarded to the plaintiff is \$12 and disbursements.

De Witt for plttf.

Noble v. Trowbridge.—

EDMONDS, J. 16th Sept.—I have consulted my brethren of this district on the course to be pursued with reference to frivolous answers and demurrers, and announce that in future the practice will be that where a frivolous answer or demurrer is put in, the plaintiff may apply for judgment as for want of an answer, on the notice prescribed for special motions; and if the answer or demurrer be adjudged frivolous, judgment will be given as if on default for want of an answer; if adjudged not to be frivolous, the cause will be put on the Circuit Calender in its proper place, and be tried or heard in its order.

It has been held at Chambers in several instances that sec. 249 of the Code cannot be applied to judgments in actions commenced prior to, or pending on the 1st July, 1848.

ALBANY SPECIAL TERM—AUGUST, 1848.

BEFORE MR. JUSTICE HAND.

Cooney v. Van Rensselaer.—The judgment roll should not contain an award of execution, when entered on fail-

ure to answer. The execution, whether against the property or person, follows from the subject matter of the action.

NEW YORK COMMON PLEAS.

BEFORE JUDGE ULSHOEFFER, AT THE CHAMBERS.

Leopold v. Poppenheimer, in an action for breach of promise to Marry.—Held, that the proper form of summons in such a case is that prescribed by the first sub-division of sec. 108 of the Code.

That where a defendant is held to bail no copy of the plaintiff's undertaking need be served on the defendant.

The words "*and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and injure the said Mary Leopold in this respect*" (usually found in the old forms) ordered to be stricken out as obscure and unnecessary, and tending to perplex the common understanding.

SUPREME COURT CHAMBERS.—AUGUST 26.

BEFORE EDWARDS, J.

In an action for trespass, the defendant cannot answer that he has a money demand against the plaintiff, and seek to have that demand set off against plaintiff's damage.

Malcomb v. Jennings—and two other Cases.—The fee of \$1, for trial fee, is not payable until the cause is called on to be heard.

BEFORE WILLARD, J.

Martin v. Vanderlip.—An affidavit to authorize a judge to make an order for arrest, under section 156 of the

code must be positive, and must make out a *prima facie* case against the defendant.

The *principles* of the former practice as to affidavits to hold to bail, showing cause of action, and counter affidavits, remain the same as formerly.

Manning v. Guyon.—Judgment records must be signed by the Clerk at the time the record is filed, or the judgment will be set aside.

It is not sufficient to cure this omission that the Clerk some time after the filing signs the record.

The Clerk's omitting to sign the record is not an irregularity merely, and being in direct violation of the statute, the omission cannot be waived by the opposite party delaying to take advantage of it. *Per Curiam*. Edmonds, J.

Nevin v. Ladue.—This case appeared in the July number of this Journal. In the course of our notice of 3d Denios' Reports, in the June number previous p. 385, we had taken occasion to refer to the decision of the New York Court of Errors reversing the judgment of the Supreme Court. The decision of the Supreme Court was published, notwithstanding the reversal, because it did not appear that the reversal proceeded upon grounds affecting the principle maintained by the Supreme Court. On the contrary, Chancellor Walworth, in a long and able opinion, concurred with the Supreme Court in the doctrine that *ale* and *strong beer* are spiritous liquors, within the meaning of the statute, which prohibits the sale of a less quantity than five gallons, without license; and it did not appear, from the report of the case, that any member of the Court of Errors dissented from that doctrine. The reason of the reversal, so far as assigned, proceeded upon other grounds altogether.

SUPERIOR COURT, NEW YORK, AT CHAMBERS.

Re Edwin Hayward. Fugitive from Justice. Requisites of affidavits.

—A. being in New York, was arrested and imprisoned as a fugitive from justice, from the State of Pennsylvania, on the charge of obtaining goods by false pretences. On his being brought up by Habeas, *Held*, That an affidavit to arrest an alleged fugitive from justice, must state positively that the alleged crime was committed in the State from which the party is alleged to be a fugitive—and that the party is actually a fugitive from that State. *Semble*, that it makes no difference whether or not the offence charged be a felony by the law of the State from which the party is alleged to be a fugitive—and that it is in the discretion of the Magistrate granting the warrant to arrest to require a copy of the charge made on oath in the foreign State.

This was an application by Edwin Hayward, a prisoner on a criminal charge, under the following circumstances. It appeared that the prisoner had been a resident of the State of Pennsylvania, but had left that State and come to reside in the State of New York. After the prisoner left Pennsylvania a charge was preferred against him by Messrs. Hampton, Smith & Co., of Pittsburg, that he had obtained from them under false pretences goods to the amount of \$2,800—this was alleged to be a felony by the law of Pennsylvania, and it was further alleged that the prisoner was a fugitive from justice. The complaint of Messrs. Hampton, Smith & Co., was taken in Pennsylvania, and afterwards an application made to a Magistrate at New York, for a warrant to arrest the prisoner in New York. On this last complaint a warrant was issued for the apprehension of the prisoner, who was thereupon apprehended.

It did not appear from the affidavit of the complainants, except by inference, where the alleged offence was committed, or that the prisoner was a fugitive from justice; nor did the complaint made at New York contain a copy of the complaint made in Pennsylvania. The prisoner, on being arrested, sued out a Habeas Corpus.

SANDFORD, J. *said*—In the case of Edwin Hayward,

which was before me yesterday, I have considered the objections taken by the Counsel of the prisoner, and I think that the prisoner is entitled to his discharge. I arrive at this conclusion on the grounds,—

1st. Because I think the affidavit on which the warrant was issued, is defective in not showing *positively* that the alleged crime was committed in the State of Pennsylvania. And—

2dly. Because the affidavit does not state *positively* that the prisoner has fled from that State.

It is true that it may readily be inferred from the affidavit before the Court, the residence of the parties, and the facts in the case, that the alleged crime was committed within the State of Pennsylvania, and that the prisoner fled from that State to avoid the consequences of the alleged offence. But mere inference is not sufficient to found the exercise of a criminal jurisdiction. The facts sufficient to confer that jurisdiction must be alleged positively.

The case of the Mormon Prophet, Joe Smith, in the Illinois Circuit Court, cited in the 6th vol. of the Law Reporter, page 57, is in point ; and although that case has not the weight of authority in the State of New York, it is, nevertheless, entitled to great respect, as it is clearly consonant with good sense and the provisions of the act of Congress, and of the State of New York.

I agree with the prisoner's Counsel in opinion, that the offence charged would by the Laws of Pennsylvania amount to a misdemeanor only ; but then I think that the statute of New York authorizes the tradition of *all* cases of crime, and that it is therefore immaterial to consider what is the nature of the offence charged against the prisoner, for we have only to consider whether it be crime according to the Law of the State from which the party is alleged to be a fugitive ; and if it be, the act will apply regardless of the precise nature of the crime.

Prisoner discharged.

New Publications.

PENNSYLVANIA STATE REPORTS, containing cases adjudged in the Supreme Court during part of September term, and December term, 1847, and March Term, 1848. Vol. 7. By Robert M. Barr, State Reporter. T. & J. W. Johnson, of Philadelphia, publishers.

The 7th volume of Mr. Barr's Reports has made its appearance in a style which must be satisfactory to the profession, and which is certainly creditable to the reporter, the printer, the binder and the publishers.—The volume before us contains many decisions of importance and deep interest to the gentlemen of the bar. In page 261, we find that the transcript of a balance due by an administrator, upon the settlement of his account in the Orphans' Court, may be transmitted to any county in the state for the purpose of binding the real estate of the debtor. In p. 288, it is held that a deed from a married woman, although duly acknowledged by her, and although designed to release her claim to dower, in land previously conveyed by her husband, is inoperative, if her husband do not join with her in the deed. In p. 326 there are some very appropriate remarks against carrying the doctrine of Post & Avery beyond the principle designed or required to be maintained. In p. 420 there is a very interesting decision on the distinction, under the statute of frauds, between *creating* and *conveying* an estate by parol, the statute not operating to prevent the *creation*, although it forbids the *passing* of an estate by such means. In p. 378 the notion of an attorney having a lien upon the funds or papers of his client is exploded. And in *Daniels v. Comth.* p. 374 we have a full recognition of the principle that the Supreme Court on a writ of error may *modify* an erroneous sentence in a criminal case, so as to conform to the law, and is not bound to set criminals at large, again to prey upon society, merely because the court below happened to err in applying the punishment, after a valid conviction. The observations of the learned justice who delivered the opinion of the court in that case are in the main correct, and, considering the embarrassments created by some recent decisions in England and elsewhere, are quite worthy of commendation. They are so much in harmony with our own views, as expressed in the *American Law Journal*, vol. 1 p. 10, that we pass over with good natured benevolence the perseverance with which the same industrious judge continues to labor in his efforts to establish his favorite doctrine on the law of costs in case of executors, as expressed in *Muntorf v. Muntorf*, 2 Rawle, 180, in opposition to the law of England, the previous decision of the

Supreme Court, and the unanswerable argument of the present Chief Justice in *Musser v. Good*, 11 S. & R. 248. The remarks made on that question in *Show v. Conway*, 7 Barr, 136, were certainly not necessary for the decision of the case, inasmuch as the learned judge tells us himself that *Show*, the administrator, "was the owner of the debt"—that he "purchased it on speculation, and afterwards took out letters of administration, the estate being at the time notoriously insolvent, and brought suit" for his own use. In such case, under the law and practice, as settled by judicial decision, and also under the express provisions of the act of 23d April, 1829, (Dunlop 429) the administrator was, of course, personally liable for the costs, without regard to the general question.

In the next number we may extend our remarks upon the decisions in this volume of the Pennsylvania Reports.

4
REPORTS OF CASES argued and determined in the Supreme Judicial Court of Massachusetts. By Theron Metcalf. Volume XI. Boston: Charles C. Little and James Brown,—1848.

This volume is equal in all respects to any of its predecessors. It is as usual excellently printed by Messrs. Little & Brown, the publishers.—The contents of the volume give one some idea of the diverse and multifarious character of the labors of the judges of the Supreme Judicial Court of the thriving and populous Commonwealth of Massachusetts. Almost every style of action can be found in the pages before us, assumption, trespass, trover, debt, replevin, waste, ejectment, mandamus, partition and the old writ of entry, all figure conspicuously. This volume is we think, as valuable as any of the Massachusetts Reports, and the reports of few States are justly entitled to more praise, or find greater favor with jurists throughout the whole country than the volumes issued in Massachusetts, whether from the Federal or State tribunals.

REPORTS OF CASES in Law and Equity in the Supreme Court of the State of New York. By Oliver L. Barbour, Counsellor at Law. Vol. I. Albany: Gould, Banks & Gould, 104 State street. New York: Banks, Gould & Co. 144 Nassau street.—1848. pp. 720.

We have had this volume on our table some three weeks and have delayed noticing it until this time, with a view to examine with some care the first product of the new judiciary system of New York. The decisions come from fifteen different districts; the greater part from New York City district. Under the new organization there are eight judicial districts presided over by eight different sets of judges, to a very consid-

erable extent independent of each other, but all liable to review in the Court of Appeals, which is composed of eight judges, four being elected by the people at large and four chosen every year from the justices of the Supreme Court.

How this system of sub-division of Supreme Judicial districts will work it is hard to tell. If we understand the matter correctly there are eight Supreme Courts in the State of New York, each independent of the other. Contradictory and conflicting decisions will perhaps occasionally be made, but uniformity of practice and decision will be maintained. It is presumed, as in Pennsylvania, by occasional applications to the Court of Review in the last resort—the Supreme Court of New York, as at present organized, answering to the Common Pleas of Pennsylvania.

This volume embraces the Supreme Court decisions only; the cases were all decided in the fall of 1847, and no appeals are found in the book. We are informed that another reporter has charge of the decisions of the Court of Appeals and will at no distant day furnish the profession with a volume. The cases contained in first Barbour are much the same as all volumes of reports furnish. Some are decided by one judge and some by several: the law and equity cases are mingled just as they occurred. Some of the cases are interesting and important. We noticed as we read, particularly the following: *Olmstead v. Harney*, p. 102, a will case. *Halliday v. Noble*, p. 137. *Ainslie v. The Mayor, &c. of New York*, p. 168. *Metzger's Case*, p. 248. *Tallman v. Farley*, p. 280. *Sanquinico v. Benedetti*, p. 315 (a bill in equity to enforce the specific performance of an engagement to sing at the opera). *Sears v. Shafer*, p. 408. *Koppel v. Heinrichs*, p. 449, as to the privilege of foreign consuls. *Butler v. Benson*, p. 526. *Lott v. Wyckoff*, p. 565. We fully agree with our excellent cotemporary, the *Monthly Law Rep.* vol. I, p. 286, in his notice of the same book:

"Their (the Reports) especial value now is, that they are the first decisions of the new judiciary, and, as such, will form an essential part of the basis of the law of New York. This fact imposes a high responsibility upon both the judges and the reporter, which thus far they have ably met. We are glad to see in the Index a reference to the cases commented on. It is as much a matter of necessity and convenience to be able to refer readily to cases commented upon and over-ruled, as it is to know what statutes have been cited or expounded.—Reporters should do all in their power to lighten the tedious labors of the lawyer. The general appearance of the volume is highly creditable to the industry, accuracy and ability of Mr. Barbour."

THE PUBLIC AND GENERAL STATUTES passed by the Congress of the United States of America from 1837 to 1847 inclusive, whether expired, repealed, or in force; arranged in Chronological order, with Marginal References. Being a continuation of the Laws published under the inspection of Joseph Story, one of the Justices of the Supreme Court of the United States. Edited by George Sharswood. Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 197, Chestnut Street,—1848. pp. 643.

We think the Messrs. Johnson have judged well in printing this volume. It is intended to complete the Public Laws of the United States. Until the recent edition of the statutes at large by Messrs. Little & Brown, of Boston, the edition of which this volume is the supplement, and which embodied all the public general acts down to 1837 inclusive, was in universal use. The former volumes of this same edition brought the laws down only to 1837, and many professional men now own copies thus incomplete; the book under notice will enable gentlemen having the former volumes to complete their sets and secure all the public general acts of the United States down to the last session of Congress. This certainly is very desirable. Messrs. Little & Brown's Statutes at Large, a voluminous and although *relatively* a cheap book, yet requires a round sum for its purchase. Too much praise cannot be bestowed upon the labor, pains and care which have been expended upon both the intellectual and typographical portions of that work; but it is nevertheless important that books already owned should not be rendered worthless by after publications, if it can be avoided. The Messrs. Johnson have made a cheap and good book in this fifth volume of the Laws of the United States; they have caused it to be adequately edited and superintended by Judge Sharswood, and we gladly commend it to professional and general attention.

HISTORY OF CONGRESS; exhibiting a classification of the proceedings of the Senate and the House of Representatives, from March 4, 1789 to March 3, 1793, embracing the first term of the administration of Gen. Washington. Lea & Blanchard, 1843.

This is a large octavo volume of 736 pages. The important measures of the government, during this eventful period of our history, are disentangled from the heterogeneous mass and collected and arranged in a system so as to present at once the entire legislation on every topic of public and private interest. Those who desire to obtain a knowledge of our early legislation, on the subjects of the organization of government, of establishing a Bank of the United States, a Bankrupt law, a tariff, a provision for the surrender of fugitive slaves, &c. can be gratified by an examination

of this work. The proceedings of the two houses on the question of the *titles* to be given to the President are interesting—the Senate was in favor of bestowing upon the President the title of “His Highness” and “Protector” of our “Liberties.” But the House would not agree to anything beyond the Constitutional title and the Senate yielded.

The work is for sale at Judd and Murray’s Bookstore, North Queen street, Lancaster, Pa.

MEDICAL ETHICS.—We are indebted to Dr. G. Emerson for a copy of the “Code of Ethics of the American Medical Association, adopted in May, 1847.” We have been refreshed and improved by the perusal of these most excellent regulations. A strict adherence to them would elevate the character of the Medical profession and prevent many unpleasant scenes which occur in country practice. The rule which enjoins gratuitous services to professional brethren in time of sickness is a rule of fraternal benevolence which must have a happy influence in preserving amicable relations, and must be equally useful to all. We cordially subscribe to all that is enjoined against holding patents for surgical instruments or medicines, or dispensing *secret* remedies. But we do not concur in the prohibition to “promote in *any way*, the use of *patent* medicines.” A patent medicine is not a *secret* nostrum. It is of the essence of a *patent* medicine that the knowledge of its component parts be open to all by reference to the records of the patent office. If a physician, at the bedside of his patient, discovers that the disease is of such a nature as to require the administration of certain remedies, the nature of which are well known to him, the circumstance of a patent having been granted for the discovery of their valuable properties affords no justification to the practitioner in withholding them. On the contrary, his doing so, would be a gross dereliction of professional duty, and an unwarrantable sacrifice of the health or perhaps the life of his patient, which might expose him to the dangers of a prosecution for mal-practice. In adopting this part of the rule we are inclined to think that some other than the proper meaning must have been attached to the term *patent*. It is often used as synonymous with *secret*. If this is the sense in which it was used by the association, their regulation is not only proper, but necessary to the safety of the public.

THE NEW LIBRARY OF LAW AND EQUITY. M’Kinley & Lescure: Harrisburg. 1848.

The numbers for July and August have made their appearance, and complete Pritchard’s excellent Analytical Digest. The subjects of Sla-

very, Visitation and Search, and the effect of a removal by a master and slave into a non-slave holding nation, in suspending the relations between them, are largely treated of, and possess at this time a peculiar interest. The appendix, containing the American Law of Evidence in Equity cases, gives great additional value to the work.

The beautifully printed pamphlet of the PEA PATCH case has been received, and a notice of it prepared which has been crowded out, but will appear in the December Number.

The American Female Poets, by CAROLINE MAY, published by Lindsay & Blakistone, Phila., is one of the most elegant publications of the time. Miss May has conferred a lasting obligation upon the country by the judgment and good taste displayed in this interesting publication.

The Ladies Wreath, published in New York, by Martyn & Ely, and edited by Mrs. S. T. Martyn, is one of the most beautiful periodicals published in this country. Its contents are generally excellent, its illustrations beautiful and the price (\$1 per annum) is so low as to place the work within the reach of almost every one.

☞ The Agents for this Periodical having been changed in the city of Philadelphia, some irregularities in the delivery of the numbers for October may have occurred from the change of residence of the subscribers. Any such irregularity will be corrected on application to the present agent, T. B. PETERSON, No. 98 Chestnut Street.

☞ All BUSINESS communications for the American Law Journal should be addressed to the publishers at Lancaster, Penna. All works for review, contributions, and other communications relative to the editorial department should be addressed to the Editors of the American Law Journal,—either at Lancaster, Penna., or at No. 6, Mercantile Library Buildings, Philadelphia. All packages sent us by the excellent Express of Adams & Co. reach their destination in safety.

☞ A title page and an index for the volume of the *Pennsylvania Law Journal*, which closed with the June number, will be forwarded to subscribers with the December number. The index and title for the current number of the *American Law Journal* will be sent at the close of the volume, in June next.

Post Office Advertising.—In the case of *E. C. Darlington v. Mary Dickson*, in the District Court of Lancaster, Pa. Hays, President, delivered the opinion, on the 30th Oct. 1848, that, under the act of Congress of the 3d March, 1845, the list of letters uncalled for must be inserted in the newspaper "*having the largest circulation*," and that inserting the list in a paper having the largest circulation in the city or town where it is printed is not a compliance with the law. Judgment for the Plaintiff.

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The professional cards of our advertising friends are rapidly accumulating.—
They will be found subjoined and on the cover.

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THE
AMERICAN LAW JOURNAL.

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DECEMBER, 1848.  
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IN THE BALTIMORE COUNTY COURT, OCTOBER, 1848.

*Lambert Gittings v. The General Mutual Insurance
Company of New York.*

1. In the case of bottomry and hypothecation of a ship and cargo, at an intermediate port of distress, upon a damage and defalcation in the value of the cargo, the adjustment, as regards the basis of value upon which it is to be computed, is to refer to the port of discharge and delivery and not to the port of distress and disbursement.

Chief Justice FRICK delivered a long and able opinion from which we make the following extracts :

“ The facts submitted in this case show that C. Stetsen, being the owner of the schooner Emily Ellicott, chartered her to the plaintiff, for a voyage to Smyrna and back again to Baltimore.

At Smyrna she took on board a cargo of figs, for and on account of the plaintiff, which were in due form insured by a policy in the office of the defendants.

In the course of the voyage, the vessel became crip-
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pled, and put into St. Thomas' in distress. The master, under the necessity of the case, executed a bottomry bond upon vessel and cargo, to cover the advances there made, which it is admitted were properly chargeable to general average. The value of the vessel there is conceded to have been 5000 and the cargo 10,000 dollars. The vessel afterwards arrived safe at the port of Baltimore; but with the cargo damaged, and depreciated in value, at least 75 per cent. Upon these facts two statements of general average have been presented, the one predicated upon the estimate of the vessel and cargo at St. Thomas, the port of distress; the other based upon the value of ship and cargo at Baltimore, the port of discharge.

The point presented to the Court upon these two separate adjustments of average, is to determine, whether in the case of bottomry and hypothecation of ship and cargo, at an intermediate port of distress, such adjustment, as regards the basis of value upon which it is to be computed, is to refer to the port of distress and disbursement, or the port of discharge and delivery. The parties in this action are, by consent, the assured and the assurer; upon the admission that the same rights and principles (by the contract of indemnity between them) must govern the case, as if the action were between the ship owner (by whom the bond has been satisfied) and the owner of the cargo; inasmuch as, whatever sum he may legally be compelled to pay in contribution, may by reason of his policy of insurance, be recovered against his Underwriters. With this necessary explanation of the record, the actual parties to the bottomry being considered before the Court, I proceed to examine the point.

Simple as is the proposition, yet it is not without embarrassment, from the fact that the learned counsel who have with great ability and research argued it, find no parallel case in the writers on Maritime Law; and it is

probably the first time that the question has been presented in this form to any judicial tribunal."

"It is undeniably a case of disbursements; but is it such in view of the authorities cited, where each party becomes a debtor at the time the advances are made, in proportion to his interest in the adventure? Is it a case of fixed responsibility upon the parties at the port of distress? Is it, in other words, a loan upon the credit of the owners? If so, the result and the doctrine contended for would necessarily follow; and the liability would attach at once, without reference to the future fate of the voyage for which the expenditure was made. That the master might so have charged his owners, is part of the maritime code. He might upon advances made, have drawn bills upon them, and fixed their responsibility under any and all contingencies. The liability attaches at the time, "as he ought to have paid the money on the spot." The bills for his accommodation and his owners affirm the personal liability at the time they are drawn, and this obligation cannot be affected by any subsequent event. It was competent for the master, as was urged in argument, to have drawn his separate bills upon the owner of the ship, and the owner of the cargo, and (perhaps) in that way have fixed the separate liability of each, which in the present view of the case is not a subject of inquiry. He might even, as has been further urged, have executed his separate bonds, distinguishing between the ship and the cargo, and the advances made for each.—But of the effect of this separation of the interest of the parties at the port of distress, and its influence upon the final adjustment of average, it is not necessary to inquire. The case here presents but the one bond,—blending the interests of both—hypothecating ship and cargo, and in separating the interest of the parties, at the termination of the adventure, I am to inquire upon the case stated for

the opinion of the Court, what is the legal effect and operation of this bond?

Referred back to this enquiry for defect of such analogies in the Law of Insurance as, would bind and control the decision of it, I am to ascertain the true design of the Contract of Bottomry. In the first place it differs materially from, and has nothing in common with, a simple loan of money. In a loan, the money is at the risk of the borrower, and must be paid at all events; but in bottomry the money is at the risk of the lender during the voyage. Again, where a loan upon the credit of the owner can be had, it is never resorted to; but only in cases like the present, where all other means are ineffectual. To prevent the voyage from being broken up and an immediate sacrifice of the property, the parties renew the adventure, upon a joint mortgage of all they have at risk, of ship and cargo. The stipulation with the lender is, that if nothing is saved finally, nothing is due; and the lender shall lose his money. But if the ship arrives, he shall receive back his principal, and also the marine interest agreed upon; and upon the arrival, not only the ship, but *then* the person of the borrower is liable for principal and interest. The personal responsibility here only springs up upon the contingency looked to in the bond. The security is given, but the payment is made to depend upon the event of the voyage.

It is nothing to say that a benefit is consummated to the parties at the time of the loan. Whether or not it was a benefit, was to depend ultimately upon the result of the voyage, for which the lender upon the bottomry became the insurer. It is, in this view, like to a condition precedent at common law, where there can be no cause of action until the condition was performed; and is excluded from that class of cases we have discussed where there is no condition precedent; but the money is due whether ship is lost or not. There it is rightfully said: "The money

raised must be repaid because every party was under an obligation, unconditionally, and without reference to any subsequent event, to pay at the place where the disbursements became necessary." And this because it was due at the place of disbursement. But where it was only to become due on the happening of a subsequent event, the liability and obligation between the parties must have relation to that event in point of time;—and it seems to me the contribution between the parties is best referred to the value of what is then saved. *The value of what finally arrives is the value of what is saved in a case like the present;* and as nothing is absolutely due upon the bond until something is finally saved, the value at that time is the true value in contribution.

In following out what I believe to be the true construction of this contract, I have not been unmindful, that it may occasionally work a hardship, to one or other of the contributing parties. But in the risks and losses attending maritime adventures of this nature, what may in one case favor the owner of the cargo may in another benefit the owner of the ship. It is at least a rule of mutual operation; and a rule that is mutual may be said to be just.—Where there is no positive law or conceded practice, and the case is one of novel impression, it is all that can be asked, if the court arrives at conclusions, which are in themselves reasonable and just, as the basis of their decision. The rule in this instance is believed to be of easier and more practical operation, than the one opposed to it; which refers to a standard of value and contribution not always accessible, at least not accurately so;—and as it is conceived, that it can work neither inconvenience or injustice in its future application, it is the less unhesitatingly adopted as the true rule.

The judgment is therefore to be entered for the sum adjusted and ascertained to be due on the value at Baltimore, the final port of discharge.

THE COMMONWEALTH v. CURTIS CANE.

*On Certiorari.**In the Court of Quarter Sessions for Philadelphia.*

1. The conviction of the statutory offence of disturbing a religious meeting, the act being silent in regard to the mode of proceeding, must be according to the course of the common law.

The opinion of the court was delivered by PARSONS, J. from which we make the following extract :

This case comes before us on a certiorari directed to James Hudson, Esq. a justice of the peace, to remove the proceedings before him of the conviction of the defendant, for an alleged disturbance of a religious congregation called the African Methodist Episcopal Church in West Philadelphia, in violation of the 1st section of the act of the 16th of March, 1847, the provisions of which are in substance these : If any person or persons shall be guilty of disturbing any congregation, society or meeting assembled for the purpose of religious worship, or assembled for the purpose of transacting any business pertaining to religious worship; or if any person or persons shall be guilty of encouraging, aiding, or in any way countenancing any such disturbance, on conviction thereof, before any judge, justice of the peace or alderman of the proper city or county wherein the offence shall be committed, shall pay a fine of not less than five dollars, nor more than fifty dollars and costs, at the discretion of the judge, justice, or alderman trying the same. The act also provides that if the fine imposed is not paid, the defendant shall be committed to the jail of the county there to remain and be

kept in close confinement till the fine and costs are fully paid.

It is readily perceived that this act is highly penal in its character and introduces into our code some new and almost surprising features relative to the subject on which legislation is had ; also as to the manner of trial, as well as punishment. As this probably is the first conviction under the law in the state, I have examined the subject with considerable attention in order that the proceedings under it may be properly understood and hereafter rightly conducted. The record sets forth "that on the 12th of September, 1847 the defendant was charged on the oath of Robert Beatley on this day being Sunday that he did disturb the congregation worshipping Almighty God at the African Methodist Episcopal meeting house called Mount Pisgah in West Philadelphia, that a warrant issued, that the defendant appeared, and the prosecutor swore that the defendant did disturb the said congregation ; after hearing defendant convicted and adjudged to pay a fine of ten dollars besides costs and stand committed till sentence is complied with. Defendant not paying the fine and costs committed to prison agreeably to the act of the the 16th of March, 1847." This is the whole of the record.

In the Act of Assembly under which this prosecution was commenced there is no provision made as to the form of prosecution, or conviction, but it simply gives to the magistrate the right to convict. And it is a well settled principle that where an Act of Assembly simply imposes a penalty and gives authority to justices of the peace to take cognizance of the violation thereof, and prescribes no method or form for the prosecution, the conviction must be in accordance with the rules of the common law, and the whole record must show that the proceedings have been conducted in all respects according to the course of the common law. Such I apprehend is the

case in all cases of summary convictions, *Comth. vs. Hardy*, 1 Ashm. 410. Where magistrates are authorized to proceed to the examination and punishment of offences in a summary manner without the intervention of a jury such authority is derived directly from the statute, and if the form is prescribed by the law it must be strictly pursued, for from it all their power is derived. But where no regulations are prescribed by the statute imposing the penalty then the conviction must be in the form and manner prescribed by the common law, and unless the proceedings are thus conducted the conviction is void. It may not be improper to remark that in my opinion if the legislature designed to give jurisdiction to magistrates to convict in this summary way, it would have been well to have prescribed the regulations thereof, and then given the right of appeal; but they have not done so, therefore we must presume they designed that the conviction should be in the manner known to the law, and in that way made it the subject of revision.

We are convinced that the record of this conviction is not in accordance with law and therefore the proceedings are reversed.

United States Circuit Court for Louisiana. Tyler v. Devel. (1 Code Reporter, 80.)

INJUNCTION—PATENT RIGHT—INVENTION.

Motion for an injunction, to prevent the infringement of an alleged patent right. *Held*, That a machine is patentable, only when it is substantially new. An invention in mechanics consists, not in discovery of new principles, but in new combinations of old principles. Where an inventor claims to have invented more than he has actually invented, the patent is void.

EDWARD C. DARLINGTON v. MARY DICKSON, P. M. OF
LANCASTER.

*June Term, 1848, No. 69½ Amicable Action on the case,
submitted to the District Court, on a case stated.*

1. Under the act of Congress of 3d March, 1845, the list of letters uncalled for at the post office must be inserted in the newspaper "*having the largest circulation*," and an insertion in a paper having the largest circulation only in the city or town where it is printed, is not a compliance with the law.

By the case stated, it appears that the *Intelligencer* has the greatest circulation in the city of Lancaster; but that the *Examiner and Herald* has a greater circulation in and out of the city than the *Intelligencer*, in other words, that it has *the largest circulation in general*. It also appears that the greater number of letters remaining in the post office in Lancaster, are for persons residing out of the city.

The plaintiff claims the privilege of advertising the letters uncalled for in the Lan. P. O. in his paper (*The Examiner and Herald*) as "*having the largest circulation*," whereas the P. O. has given the advertisements to the *Intelligencer*, as "*having the largest circulation*" *in the town*; and the question is, whether under the Act of Congress, "To reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds on the revenues of the post office department," passed March, 3, 1845, the *Intelligencer* or the *Examiner & Herald*, is, by its *circulation*, entitled to the advertisement of the uncalled for letters.

By the second clause of the 18th section, it is enacted, as follows, viz: "And all advertisements made under the order of the Post Master General, in a newspaper or newspapers, of letters uncalled for in any post office shall be inserted in the papers or paper of the town or place where the office advertising may be situated, having the largest circulation, provided the editor or editors of such paper or papers shall agree to insert the same for a price not greater than that now fixed by law; and in case of question or dispute as to the amount of circulation of any papers, the editors of which may desire this advertising, it shall be the duty of the postmaster to receive evidence and decide upon the fact."

The newspaper of the place, where the P. O. is situated "having the largest circulation," has ordinarily the greatest circulation in that place; which was a good reason for the enactment designating the paper *having the largest circulation*, in general terms, as the one in which the advertisement of letters uncalled for, should be inserted.

There is no ground to warrant a restriction of these general terms. To construe them,—having the largest circulation *in the town or place*, is to change their meaning: it would make the provision different from what Congress made it, who, had they intended thus to restrain it, would have used another form or collocation of words; as, for instance, 'shall be inserted in the paper or papers of the town or place where the office, &c. having the largest circulation *therein*,' or, 'shall be inserted in the paper or papers having the largest circulation in the town or place where the office,' &c.

The manifest difference of sense in these forms of expression, makes it evident that congress could not have intended to designate the paper having the greatest circulation *in the town or place* merely where the office is situated—otherwise they would have used the language

just mentioned, or some other similar form of words, to express such intention.

Where there is no ambiguity, the ordinary grammatical sense of the words conveys the only true meaning. Here, there is no ambiguity: the paper having the largest circulation, is the paper which distributes the greatest number of copies abroad, without reference to locality. The term, "*largest circulation*," will bear no other, and least of all, a *restrictive* construction.

The greater number of the letters remaining in the post office at Lancaster, being according to the case stated, for persons residing out of the city, there is nothing in the facts of the case, to justify a departure from the unequivocal sense of the terms, "having the largest circulation," which express the condition best adapted to attain the object of notice to those, to whom the letters uncalled for are addressed.

Post offices are established not only in large towns but in the smallest villages and other places,—for the accommodation of rural districts, as well as the dense communities of populous cities. Suppose two papers in a village; one having half a dozen subscribers in the village but many hundreds out of it; the other, a dozen in the village and not half a dozen out of it: if the one having the greatest circulation in the village, were selected to advertise, the persons to whom the uncalled for letters belonged would, for the most part, receive no notice; whereas by advertising in the other, the most extensive notice would be given to them: and that is evidently the design of the law.

Where a post office is situated in a small town, and the usual or ordinary delivery extends beyond its precincts, it will commonly happen, (as in this case,) that the greater part of the letters remaining in the office, will be such as are addressed to persons of the vicinity, and not

of the town. Hence, the paper of the "*largest circulation*," not the paper having the *greatest* circulation *in the town*, is best adapted to furnish the owners of the uncalled for letters with the information intended by the Act of Congress.

For these reasons. I am of opinion that upon the case stated, the editor of the Examiner & Herald is entitled to have the advertisements of the letters uncalled for in the post office of Lancaster, inserted in his paper, and that if he has complied with the *proviso* in the clause above quoted, in relation to the prices, he is entitled to recover.

A. L. HAYES.



Supreme Court of Pennsylvania.

ABSTRACTS OF DECISIONS OF THE SUPREME COURT, FOR THE WESTERN DISTRICT. SEPTEMBER TERM, 1848.

Reported for the American Law Journal by
JAMES S. CRAFT, Esq.

FIFTH JUDICIAL DISTRICT,—ALLEGHANY COUNTY.

Haffey's adm'r. vs. Logan.—It is not necessary to set out a special contract in the statement of a claim under a Mechanic's Lien since the Act of 16th April, 1845, Bolton v. Johns, 5 Barr, 145. "This decision is too fresh in the odour of judicial sanctity to admit of doubt or question." Actual payment of the purchase money is necessary to establish the character of an innocent purchaser as ruled in the case cited. Per Coulter, J. Sept. 18.

Wilson for use v. Young.—An attorney at law has authority to submit the decision of a case to an umpire as well as to arbitrators. Per Coulter, J. Sept. 12.

Cunningham v. Paul. An appeal from a Justice of the peace lies within twenty days from final proceeding by the Justice. Per Bell, J. Sept. 11.

Mevey v. Mathews.—One defendant may be admitted to prove that he was principal, and the other defendants sureties in a joint obligation if called by the plaintiff, *with his own assent*. Per Rogers, J. Sept. 14.

In Re Beeler's Road.—If the surveys returned differ from the lines or marks of the road on the ground, the road is to be opened by the latter, or by the information of those who were present when the lines were run.—The Quarter Sessions have no power to interfere with the proceedings after their affirmance in the Supreme Court. Per Curiam. Sept. 11.

Baldwin twp. v. Kline.—Although a slave may be defectively registered, his settlement follows that of his master *de facto*.

Scemle, That after receiving the services of a slave until a settlement be gained as above by him, a master is estopped from denying his liability to the township in which such slave becomes chargeable according to such settlement. S. P. as Ferguson twp. v. Buffalo twp. 6 S. & R. 104. The value of the services of an unrecorded slave cannot be recovered on quantum meruit against the master, ignorant of such defect in the registry. 5 W. & S. 357. S. P. Per Rogers, J. Sept. 15.

In the petition of T. B. Young.—A certiorari to the common Pleas will not be quashed for want of a special allocatur, where such allowance is a matter of right. The Supreme Court will allow it, *nunc pro tunc*.

Under the Act of 13th April 1791, such certiorari must be sued out within seven years, by analogy to the time allowed for a writ of error or appeal, in order to remove a decree to execute the contract of an intestate for the conveyance of real estate.

Church & Carothers v. Griffith & Dixon.—Fixtures erected by the tenant on ground leased for a term of years are to be treated as chattels, not only in regard to the lessor but all other persons. They are therefore not the subject of a mechanic's lien.

On sundry executions, some against one of the members of a firm, and others against the firm generally, the sheriff returned only a sale of the personal property of the firm. The proceeds of such sale were distributed to the partnership creditors, although the executions against the individual member of the firm were received by the Sheriff before those against all the partners. Decided on the ground that the amount of the sales being insufficient to pay the partnership debts, such result proved that a sale of the interest of the individual member would have been unproductive, therefore useless and unnecessary. President Judge, HOPEWELL HEPBURN. Opinion of the District Court of Allegheny county, approved as "lucid and accurate." Sept 18.

Alexander's adm'rs. v. Lecky. A former Sheriff may plead the statute of limitations against a claim for the surplus arising from a sheriff's sale (after satisfying an execution against a defendant) in an action brought by such execution defendant after a lapse of six years. Per Burnside, J. Sept. 11.

Beale v. Buchanan.—Where there are two pleas, one of fact, as payment, &c. and another in law, as *nul tiel record*, the court may try either first at their discretion, but it

must appear that they did try both. An entry of judgment on the verdict is not evidence of trial of the plea of *non tuel record*, but such judgment will be applied only to the verdict. [Vide *Baxter vs. Graham* 5 Watts, 418; *Share vs. Hunt et al.* 9 S. & R. 404; *Shirtz vs. Shirtz*, 5 Watts, 255, which were entries of judgment generally.] Per Rogers, J. Sept. 11.

Brackenridge v. Arthurs.—It is discretionary in the court trying a cause in order to prevent injustice, to admit as rebutting evidence, that which strictly should have been introduced in chief.

Declarations of a person claiming under a deed that it was signed by the apparent grantor, are not evidence to prove its authenticity. Per Rogers, J. Sept. 11.

Wagner v. Wagner.—When a defendant pays a debt after suit is brought, he is still liable for the costs which had accrued at the time of such payment. Per Coulter, J. Sept. 18.

Morehead v. Payne.—A judgment signed before the expiration of the tenth day under a rule requiring an affidavit within ten days after the return day, is premature and irregular. Per Curiam. Sept. 11.

Clark v. Quigley.—An action of trespass *vi et armis*, for debauching the plaintiff's wife, dies with the person. Per Burnside, J. Sept. 11.

Lapsley v. Lapsley.—A devise by testator of the plantation on which he resided to his four sons, to be equally divided between them according to quantity and quality, each of said sons so receiving land to pay \$75 towards a fund to be divided among the sisters "*and if any one of my sons should die before they have issue, their part or portion shall be equally divided between the surviving brothers*" con-

stitutes an estate tail general in the premises with remainder in fee to the survivors, and upon the decease of one without issue, the devise in remainder takes effect.

If real estate be given to several, with a limitation over, if any die under twenty one, to the survivors, the shares of such as die under that age will vest in the persons then surviving and also in the representatives of those who have previously died having attained that age and leaving issue.

A judgment *de terris* against the shares in the hands of the survivors allotted to them in severalty afterwards, but originally devised to all, when rendered in an action brought to recover the legacies bequeathed to the testator's daughters, is not evidence in an ejectment brought by such survivors to recover the land. Per Bell, J. Sept. 18.

Biggert v. Dinsmoor, et al.—In an action of ejectment brought to enforce the payment of the balance due on a mortgage the defendants will not be allowed to shew that the plaintiff was a trustee for a life estate, which had expired, inasmuch as the mortgage deed clearly vested the legal estate in the trustee plaintiff. Per Coulter, J. Sept. 23.

Grimes v. Percival.—Service by the plaintiff himself of a notice to a justice of the peace preparatory to bringing a suit for the penalty of \$50 for marrying a minor contrary to the Act of Assembly, will not dispense with the necessity of his signature or that of his attorney to such notice. Per Curiam. Sept. 18.

Hill v. Overseers Jefferson twp.—A court of equity has power to grant a new trial only after a verdict on an issue sent to a court of law to take the opinion of a jury on a matter of fact, but never in an original action of which the court of law has exclusive jurisdiction. Per Curiam. Sept. 18.

McClurg v. Barker.—The averment of an acknowledgment that plaintiff had transferred to defendant one half of a tract of land which when sold by defendant he would account for its proceeds—and that a sale was made for a certain sum, is not a statement of sufficient cause of action in assumpsit. Per Curiam. Sept. 18.

Porterfield v. Winebeddle.—An offer by the defendant in an action brought against him for maliciously making complaint for surety of the peace, that plaintiff's general character, after the complaint, was bad, is incompetent evidence.

The rule as to presuming malice from the want of probable cause stated by Justice Parke in *Mitchell v. Jackson*, 5 Barnw. & Adolph. 514, extracted and adopted.

Words which might prove probable cause, if used without provocation, will not have that effect, if provoked in a scolding match.

The sentence of the court of Quarter Sessions, discharging the plaintiff in the case of surety of the peace and that the prosecutor should pay the costs, is evidence in this suit, and *semble* sufficient to throw the burthen of proof of probable cause on the defendant.

Mere belief of the prosecutor is no evidence of probable cause. There must be facts authorizing a reasonable man to entertain such belief and that he was actuated by an honest and fair intent to bring a suspected culprit to justice. Per Coulter, J. Sept. 23.

Maxwell v. Beltzhoover.—Where the plea of the garnishee in foreign attachment admits the claim on which his liability is alleged, but offers new and distinct matter to avoid it, the plaintiff should demur, or traverse the facts, and may be compelled by rule to reply, but until he does, it is error to non suit him for not proceeding to trial.—Per Coulter, J. Sept. 12.

Peppard et ux. v. Deal.—Devise, “as to such worldly estate, wherewith it hath pleased God to bless me, I give and dispose of the same as follows, viz: (after giving some separate estate to S.) “I devise the remainder of my estate real and personal to all my surviving children, subject to the payment of my debts and reserving one third of the profits to my wife during her life,” passes an estate in fee to such surviving children.

Partition will not enlarge or vary the estate of any of the parceners. Quere of owelty allowed or received?—Per Coulter, J.

Woods v. Halsey.—Docket entries and the Sheriff's docket are evidence where the writs of execution are lost. Per Burnside, J. Sept. 23.

Dennyson et al. v. Leech & Co.—Judgment by default taken under the Act of 13th of June, 1836, set aside, because the narr. was not filed until after the return day of the writ (8 W. 43) under the 66th rule of the District Court, because the amount stated in the narr. varies from that in the affidavit. In such case the judgment might be sustained on a remittitur of the excess, but here the sum declared for is the test and therefore not acceptable to the plaintiff.

An amendment enlarging the amount of damages claimed will not have a retrospective effect.

Where a judgment is opened without restriction, it remains as a security for what may be finally found due, but the burthen of proof on the pleadings rests on the plaintiff. Per Rogers, J. Sept. 19.

Anstrutz v. Fitzsimmons.—The assent of the partners of a petitioner for bankruptcy to a set off being made after petition sustained on *Miller v. Black*, 1 Barr, 420. Per Bell, J. Sept. 18.

McKelvy v. Wilson.—An assignment of error “that several counts are defective” without specifying the defects, will not be regarded in a court of error. (2 Binn. 509, repeated.) Per Burnside, J. Sept. 23d.

Milttenberger v. Beacom's heirs.—The estate of a ground landlord under a perpetual lease, is such an insurable interest as will authorize him to insure the buildings erected on the ground in his own name, for his own benefit.

One may insure the property of another without previous authority, and it will enure to the party intended to be protected upon the subsequent adoption of it by him, even after a loss has occurred.

To enable the beneficiary to sue upon the policy directly he must be expressly named in it or the interest of all concerned must be covered generally or specially, but if the agent receives the fund he is liable in an action for money had and received, if plaintiff can shew his adoption of the acts of agency and his ratification of it before *or after* the loss.

The question of agency and for whom the insurance was intended is one of fact for the jury, and the right of the insurers to repair, &c. if reserved in the policy, is a circumstance authorizing some presumption that the lessees had an interest in the policy. Per Bell, J. Oct. 16.

Weaver v. Wood.—Notwithstanding the recital in an unsealed writing of the receipt of one dollar, and the release of rent afterwards to accrue, as the consideration of the surrender of possession of leased premises, such surrender may be given in evidence as the consideration of another bargain by the landlord to renew the lease.

An action lies on a promise to make a lease, and a jury may fix the rent and term from evidence. Per Gibson, J. Oct. 16.

Moore v. Small.—An agreement of one claiming land by occupation to give it up, on a promise of the owner to pay money, accompanied by evidence of the owner's leasing to another, assessment to the owner and payment of taxes, will prove a relinquishment of such occupier's right although the payment of the money be not shewn and it will be presumed after six years.

Potts v. Gilbert, 3 Wash. C.C. R. 475, as assailed in *Overfield v. Christie*, 7 S. & R. 177, denied.

Evidence of an acknowledgment by occupant that he had *released* will not be construed to mean a sealed *release* of such a right, as a surrender would have been operative by *parol*. Per Burnside, J. Oct. 12.

Estate of W. J. Wells.—The Orphans' Court of Pennsylvania have the power to compel Guardians to settle the accounts of their wards, after the dissolution of their relation by the attainment of majority by the wards. (17 S. & R. 314; 1 Pa. 282; 2 W. 494; 7 W. & S. 49; 7 Barr, 464) and the 10 § of the Act of 1832 requiring triennial settlements during the ward's minority and final settlement afterwards does not impair that power. The court may require guardians to file their answer to the citation immediately in the office of the Clerk of the court or with the Register who will certify it in due course, but it is error to dismiss such a citation from the Orphans' Court with direction to apply to the Register. Per Bell, J. Sept. 11.

Norton v. Com'th.—An indictment will lie against two or more persons for a conspiracy to pass a three dollar counterfeit note of a chartered bank of the state of Ohio, although such notes are prohibited by statute in Pennsylvania. Whether the passage of such a counterfeit note by an individual is a crime? Per Coulter, J. Oct. 20.

Lee v. Lee.—An order of the Court below, requiring the defendant to commence his case by exhibiting a written contract respecting the transfer of land, before parol evidence was given of such a writing or its existence premised by his counsel, is error.

So is the exclusion by the court of any parol evidence of the contents of what the defendant alleged to be a written contract for the sale of the premises in question, because in the opinion of the court the previous existence and execution of the contract was not proved and the paper in the language of the Court was unfinished, and merely heads of a will drawn up, for execution. The question in such cases is, whether *prima facie* the party has proved that the paper was executed and did exist and has been lost and due search made for it.

A refusal to direct the plaintiff's counsel to demur to evidence and the denial of the request of the defendant's counsel that unless a demurrer is filed he shall be permitted to address the jury on the facts of the case, is error.

It is the duty of the jury under their oath to render a verdict on the whole evidence submitted, subject to the charge of the court, and although sporadic cases may occur of juries disregarding the law as laid down to them, the remedy is by new trial, and such cases will not justify a departure from the well defined practice.

The party who desires to test the insufficiency of evidence may demur to it, or require the opposite party to reduce his evidence to writing and move the court to reject it, or when it is offered by the plaintiff move for a non suit.

What is sufficient evidence of a parol sale and change of possession to rescue it from the dominion of the statute of frauds fully considered. Per. Coulter, J. Oct.

Hardin et al. v. Hays.—Under a will the devisee is entitled to an estate in fee, although no words of inheri-

tance, by reason of the charge out of that part of the real estate devised to him which subjects it to the payment of a legacy of \$50, \$25 in one year and \$25 in the next year.

Proof of the declarations of a deceased subscribing witness to a will that the testator was not in his right mind when the will was drawn and executed, that he regretted having drawn it, or any thing to do with it, and that it ought to be burnt or destroyed, erroneously rejected, and if one of the witnesses to a will give evidence impeaching the testator's sanity, the party introducing him may prove that he swore differently at a former trial, and give in evidence the notes of his testimony at such former trial.

After such contradictory evidence, the whole should be submitted by the court to the jury, with a strong expression that it was entitled to but little weight, but it was error for the court to repudiate it entirely and to admit evidence of handwriting of the witness as if he were dead, or out of the jurisdiction of the court. The whole evidence of the witness must be taken together and a party cannot avail himself of one portion of it and discard the remainder.

Where general imbecility of mind of a testator is proved, it is not sufficient to establish a will that lucid intervals were proved both before and after the making of it, in the absence of any proof of his condition on the day it was executed. There is no presumption that a lucid interval once proved, shall continue.

The competency of the testator to make a will must be decided by the jury at the point of time when it was executed.

6th Judicial District—Eric, Crawford, Venango and Warren counties.

Dowler & Wife Exrs. Griffith v. Lang.—The statute of limitations as to simple contracts will not bar an action

of ejectment brought within twenty years by one who purchased land jointly with another and paid more than his share of the purchase money and brought this action to recover back such surplus. Per Coulter, J. Oct.

Sharks v. Commonwealth.—It is not error to sentence a defendant on an indictment found 'a bill', omitting the word "true." Per Coulter, J. Sept.

Kay & Co. v. Allen.—A guaranty or request to credit given previous to the credit being afforded, will not dispense with the notice to the guarantor of the acceptance of his guarantee, which notice is necessary to bind him. Per Bell, J. Oct. 7.

Presbyterian Congregation of Fairview v. Sturgeon, et al.

Where two congregations of the same name claimed property devised, parol evidence is not admissible to prove which of them testator meant should enjoy it, if there was but one of the name when it was written.

The main point of this case is that decided in *Comth. v. Green*, 4 Whart. 531. Per Coulter, J. Oct.

Hart v. Rogers' admr.—One of two joint mortgagors who pays all the mortgage money has a right to keep such mortgage alive, and have it sued out for his use, after its assignment to him, notwithstanding he appears as the beneficial plaintiff and nominal defendant on the record. Per Coulter, J.

Osburn v. Holmes.—*President Gaylord Church's opinion affirmed by Burnside, J.*—A manufacturer of hats and caps who sells articles of domestic manufacture to an amount less than \$1000, not being manufactured by him nor at his shop, is liable to pay a license fee under the laws of Pennsylvania.

Reed v. Reed.—Defendant denying a tenancy is entitled to no advantage of a lien on land if he had one. He can

not after such denial shift his ground and assume that he has an equity to retain possession under an improving lease, until paid for improvements. There is no lien for improvements at common law and it required a statute to create one for the protection of mechanics and material men. If such lessee has any remedy it must be on his contract. Per Gibson, C. J. October 2d.

Briggs, et al. v. Thompson.—The general property of personal chattels draws to it the possession and of course a right to maintain trespass for their injury, &c.

Before a division of the crop between a landlord and tenant on the shares one cannot maintain trespass against the other for taking it, unless he destroy it.

What acts by landlord constitute eviction of tenant?—An entry only suspends rent, but does not extinguish the right to recover what had previously fallen due. Per Coulter, J. October, 9.

Champlin v. Williams.—If several persons as tenants in common buy land and one of them is obliged to pay a mortgage on it for which the others were equally bound and obliged to contribute, he may protect himself by taking an assignment of it, whether his interest be legal or merely that of a *cestui que trust*. Per Coulter, J. Oct. 9.

Tenth Judicial District.—*Westmoreland, Cambria, Armstrong, Indiana, Jefferson and Elk counties.*

Williamson's admr. v. Sullivan.—Affirmed on the ground that no writ of error lies to a judgment on an award of arbitrators under the compulsory act, although the narr. set forth no legal cause of action. Per Burnside, C. J. Oct. 18.

Jones v. Alison.—A common case of Guarantec, and the

landlord is therefore bound to look for his rent to the lessee and the premises in the first instance before resorting to an action against the Guarantor. Per Gibson, J. Oct. 19.

Wetty v. Roofner.—In ejectment by the alienee to recover a child's share of an intestate's land, it was decided that in partition in the Orphans' Court, if the names of the heirs are fully presented in the original petition and process, it is not necessary to serve the subsequent rules on the alienees of the heirs, whether the conveyance under which such alienees claim be recorded or not.—*Lis pendens* is as near to actual notice as the registry of a deed, and the decree of the Orphans' Court will not be overhauled in a collateral action. The alienee must look to the fund in court arising from the sale ordered on the refusal of the heirs &c. to take at the valuation. Per Gibson, C. J. Oct. 19.

Picking v. Alwine.—Constructive notice by open and unequivocal possession is generally notice equivalent to registration.

Possession of a tenant is sufficient to put one who contemplates a purchase of another title than the landlord's on enquiry (notwithstanding Sugden on vendors, Lord Eldon in *Atty. Genl. v. Backhouse*, 17 Ves. 293.) To sustain him, the learned Justice adduces, 2 Ves. Jr. 440; 13 Ves. 121, 17 Ves. 443, 7 W. 167, 10 W. 67, 2 B. 466.—Per Bell, J. Oct. 23d.

St. Clair's heirs v. Shall.—The declarations of a widow whose possession of land was relied upon as sufficient when tacked to that of her husband to eke out a title under the statute of limitations, when disclaiming her husband's title or her own, are evidence against such title by adverse possession. Per Burnside, J. Oct. 24.

Hazelbaker v. Reeves.—By this decision, *Case v. Cushman*, 1 Barr, 246, is expressly overruled as regards the invalidity of a promise made within the six years to save the bar of the statute of limitations and with it falls the dictum in *Morgan v. Walton*, 4 Barr, 321, distinctly founded on it. The doctrine on this subject left on the footing of *Forney v. Benedict*, 5th Barr, 225. Per Coulter, J.—Oct. 23.

Moorhead v. Johnston's admr.—A judgment obtained before the purchase of a freehold estate and not revived during the life time of decedent must be revived within five years after his death to continue the lien against the widow and heirs. Per Rogers, J. Oct. 16.

Opinion of Prest. Judge, John C. Knox, affirmed.

Hugus v. Cannon.—A surety for a guardian held liable twenty years after the date of the bond given when the minors were eight and five years old.

Such a surety is liable without proceedings against the principal where the latter is dead or has removed from the state. Per Rogers, J. Oct. 28.

Jamieson v. Pomeroy, et al.—In a suit brought by the payee of a note, if the objection that the plaintiff is not the payee (the name by which suit is brought being “James” and that mentioned in the note being “Major”) is not taken at its presentation for payment, the jury may presume that both names apply to the same individual.

Where judgment was taken by default against several defendants jointly some of whom were not served and did not appear, under the authority of the act of 16 June 1836 (*Dunlop*, 741) enabling the Supreme Court to “modify” as well as reverse or affirm judgments brought before them, this court will reverse the judgment only against those who were not served &c. and affirm as to the others.

The decisions in *Boaz v. Hiester*, 6 S. & R. 18, *Bratton v. Mitchell*, 5 Watts, 71, and *Latshaw v. Steinman*, 11 S. & R. 357 are thus rendered "obsolete." Per Rogers, J. Oct. 20.

Altamus v. Long, et al.—An actual settler cannot extend his possession against a warrant holder, beyond his enclosures, by an unofficial survey so that subsequent enclosure and cultivation within its lines can be referred back to it and receive protection from the date of such survey. Per Coulter, J. Oct. 23.

Thompson v. Thompson's Ex'rs.—A codicil to a will proved by one witness rejected in an action of debt for a legacy bequeathed therein, there being no formal decree of the Register nor letters of administration ever issued.—Per Coulter, J. Oct. 23.

Wentling v. Wentling's admr.—The opinion of Judge White adopted on the following points. A testator owning real and personal estate by his will empowered his executors to sell the former, and devised as follows, viz: *I give and bequeath to my wife Barbara all my personal estate of what nature the same may be for her natural life or widowhood. and I devise and bequeath to my children (Henry, Dewalt, &c.) all an equal share of my estate after paying all my just debts*" construed to be a limitation over to the children of the testator after the widow's decease of the personal estate not used by her.

Whether giving up the old bonds and taking new ones by the widow in her own name (she being also executor) was a conversion of them to her own use, rightly left to the jury as a question of fact. Per Rogers, J. Oct. 19.

Jack's adm'rs. v. McKee.—This was an action of assumpsit for work, labor, &c. and in which the plaintiff declared on an express contract that defendant's testator had prom-

ised to give plaintiff a certain farm worth three thousand dollars if she would serve as his housekeeper until he died.

Evidence that he had written a note of \$1000 and gave it to her and told her to put it away to be paid at his death, was admitted without proof of its loss to shew the relative situation of the parties and testator's estimate of plff's. services.

In such a suit the measure of the damages is the value of the land promised to the plaintiff and not what the jury might believe to be a compensation for her services as between master and servant, and the assertion of this rule is not an indirect repeal of the statute of frauds, which prohibits parol transfers of land. [3 W. & S. 563, 7 Cowen, 92, 2 Hill, 485, 7 W. 530, cited and reviewed.]—Per Rogers, J. Oct. 23.

Miller v. McCaffrey, et al.—Where there is a provision in a contract for building that there shall be no compensation for extra work and that the expense of any alterations shall be agreed on when suggested, no claim for extra compensation can be maintained without clear and satisfactory evidence of a new, distinct and independent contract. The fact of the owner's standing by and seeing the alterations in the plan without objection and accepting the work, will not render him liable.

A workman employed to do a particular job, who adds extra work without consulting his employer, cannot charge for it. 1 McCord 22, 3 Carr. & Payne, 453, cited and approved. Per Rogers, J. Oct. 16.

[N. B. The above decision is well calculated to prevent the gross impositions practised by charges for extra work which sometimes exceed the amount of the original contract.]

[The foregoing note is by our intelligent reporter, Mr. Craft, but the editors of the American Law Journal add their most cordial approval of the decision and of the reporter's note.]

Williams & Co. v. Gilmore & Hunt.—An appropriation of money by the Sheriff, before the return day, to executions in his hands according to his notions of right or priority is premature and at his own risk, and if erroneous will be set aside, although he had no notice of the ground on which his appropriation was afterwards contested.—He is bound to await the return day, to give all parties an opportunity to be heard. Such appropriation will also be set aside on the ground that the money was not paid into court. Per Bell, J. Oct. 16.

Henderson vs. Irvine.—This writ of error was taken by the party in whose favor a former judgment in the same case had been affirmed, and was quashed on the ground that when the case was formerly before the court he should also have taken his writ of error, or when errors were complained of by the opposite party, confessed them. By resisting the affirmance under the former writ and denying errors then he is estopped from alleging errors afterwards, or taking a writ of error on the same judgment. Per Rogers, J. Oct. 24.

Henderson v. Irvine.—Whether money advanced for the redemption of property of which a conveyance was taken to the advancer, was a loan or sale, is a question for the jury. If it were a mortgage or the feoffee a trustee holding the legal estate merely as a security for the repayment of the money, no device by which the statutes against usury are attempted to be evaded can be successful. Per Rogers, J. Oct.

Irvine v. Henderson.—The relation of client and counsel in collecting a judgment does not extend to a collateral arrangement made by the plaintiff with defendant to redeem his property after it was sold, on the payment among others of the plaintiff's judgment, for which arrangement defendant, not plaintiff, compensated said counsel. Per Rogers, J. Oct. 25.

Townsend v. Wilson.—A copy of county treasurer's deed of land sold for taxes recorded in the office of treasurer, is not evidence.

A sale of land for taxes is good although the legal title of it remains in the county as security for purchase money due on articles of agreement for its sale. Per Burnside, J. Oct. 24.

Arthurs v. Ridgway twp.—The custom to apportion the roads between supervisors is universal and the signature of a due bill by one for work done within his particular precinct will bind the township. The principle of 8 W. 125 is that deliberative acts require the assent of all but ministerial acts may be performed by one. Per Curiam, Oct. 23.

Evans v. Hastings.—A notice to a tenant for years to quit, written three months, served after the expiration of the term, is not a renewal of the lease for another year.—Per Coulter, Oct. 23.

Heath v. Biddle, et al.—An interruption in the personal occupancy of land by a settler from a change in his circumstances, (if he use due diligence to resume the actual residence,) will not be regarded as an abandonment.

A right by improvement or settlement vests by death in an infant heir. Per Coulter, J. Oct. 23.

14th Judicial District, Washington, Fayette and Greene counties.

Estate of Dower.—This was an appeal by the legatees to whom were made pecuniary bequests under the will set forth in the case of Downer v. Downer, 2 Watts, 63, who applied to the Orphans' Court of Fayette county under the 59th and subsequent sections of the Act of 24th February, 1834, Dunlop's Dig. 521, to compel Levi Downer, to

pay them the legacies charged on the land devised to said Levi Downer, said court having dismissed their petition. The Supreme Court awarded a procedendo to the orphans' court.

It is not necessary that Executors should be made parties to such a petition unless there are creditors; if there be the Orphans Court have the power of a Court of Chancery to add parties. Per Rogers, J. Oct. 28.

17th Judicial District. Beaver, Butler, and Mercer counties.

Laughlin v. Bunting.—After the lapse of seventeen years from the acknowledgment of a sheriff's deed, the court will presume that a certificate of the Justice that execution had been issued before him and returned "Nulla Bona" was produced to the prothonotary before he issued the fi. fa. on the transcript, although such certificate is neither on file nor noted on the docket or proved to have ever been in existence. Per Burnside, J. Oct. 16.

Minisinger v. Kerr.—Modern decisions in slander preclude covert attempts to prove guilt imputed to the plaintiff without a plea of justification but permit defendant to shew that he had some reason though founded in mistake to believe the charge well founded, therefore evidence that in making the charge defendant had mistaken the character of an act which was a mere trespass and inadvertently called it a felony is admissible under the general issue in slander. Per Bell, J. Oct. 7.

Decamp v. Smith.—Great irregularities in the return of a Sheriff's Sale and loss of writs &c. may be cured by time. Per Gibson, J. Oct. 11.

Stevenson v. Mathews.—The case reported 6th Barr, 495, brought up again after verdict and judgment therein, to which Oliver Stevenson the grantor and founder of the

trust was made a party defendant by his own act and such addition of a party, approved as agreeable to equitable remedy. Per Coulter, J. Oct. 6.

New Publications.

REPORTS OF CASES argued and determined in the Supreme Court of Errors of the State of Connecticut; Prepared and published in pursuance of a Statute Law of the State. By Thomas Day. Volumes 1, 2, 3 and 4. Second edition, with notes and references. New York: Published by Banks, Gould & Co., 144 Nassau street, and Gould, Banks & Gould, 104 State street, Albany. 1848.

We are very glad to see these exceedingly valuable Reports reprinted. The whole series of Connecticut Reports have a unity of character, and degree of value, that many of the State Reports do not possess. They are all by one hand and are all most excellently and competently done. The State of Connecticut has the honor of having printed the first State, and indeed first regular law reports on this continent. Kirby's Reports were published in 1789: Dallas' Reports were published in 1790; these were the two first.

It is seldom that a reporter holds his office as long as Mr. Day has filled his. He began to report in 1817, and now, (1848,) is still reporting. This we believe is a longer period than is covered by the reporting labors of any gentleman in our profession in this country.

In his preface the venerable and amiable reporter tells us: "Since the first edition of the first volume of these reports, a period of more than thirty years has elapsed, and through the mercy of a benignant Providence, supported by the unvarying favor of the Court, and encouraged by the approbation of his professional brethren, he, who prepared that volume for publication, is still engaged in similar labors. During this period, what changes has he witnessed on the bench and at the bar? At its commencement, Reeve, pre-eminent as a jurist, and greatly beloved for his private virtues, was at the head of the court. His pupils in the law school, have since been his successors in the highest seat on the bench. Of his judicial associates, one only survives—the friend and class-mate of Chancellor Kent—exhibiting a rare specimen of the *mens sana in corpore sano*. Of the five judges who composed the court, on its re-organi-

zation under the constitution, not one remains. All the present members of the court are the reporter's juniors in age, though far in advance of him in learning and talents. At the bar, the period referred to, has wrought changes not less striking. There too, one generation has passed away, and another taken its place. Though a grey-haired veteran, who was in practice at the commencement of these reports, now and then comes into court, yet he comes rather to see how the young men of these times acquit themselves in contests which once fired his own breast, than to take any part in them himself."

REPORTS OF CASES determined in the Supreme Court of Judicature, of the State of New Jersey. By Robert D. Spencer, Reporter. Princeton: Printed by John T. Robinson. 1847.

Recent reports from the State of New Jersey are strangers upon the shelves of the booksellers. We have seen none since 4 Harr: which was printed in 1843, and brings down the cases to September Term, 1842, since which a period of five years has elapsed. Mr. Spencer cannot certainly be accused of indecent haste in the art of book-making. The reporter commenced his labors with the November Term, 1842, and concluded them with October Term, 1846, at which time the learned and amiable Chief Justice **HORNBLOWER** retired from the Bench.

We have read this volume of reports pretty carefully, and wish to suggest several matters which have occurred to us in the perusal. The mechanical execution is unsatisfactory; but what else can be expected under the New Jersey legislation, where from the petty motive of distributing patronage, the printing is distributed in various parts of the State, without the least regard to the wishes or convenience of the Reporter; three if not four different printers have been appointed during the progress of this volume through the press: a part of it was printed at Camden, and a part of it at Princeton, while the Reporter resides at Mount Holly.—Such inefficient means must result disastrously; neither printer nor reporter can do himself justice; and we doubt not that the reporter has been often mortified by typographical blunders of a serious nature, which resulted from the peculiar badness of the system of State printing: blunders not in trifling things, but of a grave and disgraceful character, in the names of books, and cases, and judges. The reporter is not in the habit, we believe, of attending the courts for any purpose connected with his duty as reporter. The Judges are required by law to furnish him with their decisions in writing, in such cases as they may deem of sufficient importance. This system, common to most courts in this country, is un-

favorable to reporting of a high character. The Judges have seldom time or disposition to prepare a concise and yet complete statement of the case upon which the decision is based, and the reporter has little opportunity, and generally less inclination to perform a duty which involves so much labor. Without fully understanding the case the syllabus cannot be satisfactory, and too apt (often the case in this volume) to be drawn from the dicta which are scattered through the opinion.

The arguments of counsel, at least the points taken and the cases cited, are exceedingly desirable and add much to the value of a decision. They inform us how far the attention of the court was called to all the points involved in a case, and how far the court was aided by the learning on the subject before it. The Bar of New Jersey has counsel whose arguments in important cases would do credit to any State if properly reported.—At any rate a reporter by the aid of counsel or of the court, should in most important cases at least, present the points made on argument. Too often, however, all this is omitted, or when given it is a clumsy exhibition in print of the entire brief, ordinarily more objectionable than the entire omission. Some cases, which will be readily seen on inspection, are well reported as regards statement and the points taken, and will make the defect spoken of more obvious in others.

We think it is a matter worthy of some notice, that the much abused, and much neglected science of special pleading, seems to flourish in New Jersey. There are many cases decided upon points of pleading presented in this volume, as well as in the volumes which contain the previous decisions of the same court. The clumsy substitute of a notice or specification of defence under the general issue is permitted, but it tells well for the legal attainments of the profession that it seems but seldom to be resorted to—the defence, when proper so to do, is generally presented in the more scientific mode of a special plea. Special pleading will generally make good lawyers, and there is but one objection to it—if this can be called an objection—it is a dangerous instrument in the hands of the stupid and the ignorant.

We notice in very many cases the *opinion of the court* delivered by one Judge, who yet uses the *first personal* pronoun *I*. This seems a small matter, but still it deserves notice and should be corrected.

Some cases we especially notice and comment on—thus:

Dorr v. Allain, p. 6.—First introduced on the authority of New York cases. The effect given in a devise to the word "survivors," used in connection with the words "dying without issue," giving to the first devisee, not an estate tail, but a fee simple, determinable on his death without issue living. This very questionable doctrine, repudiated in England, seems now to be generally and firmly engrafted on the American law. An able

criticism on the New York cases will be found in American Law Magazine, 2 vol. p. 88, which well deserves a perusal.

Dummer ads. Dorr, p. 106, (an awkward mode of entitling a case which a careful reporter should avoid,) contains a well written and valuable opinion upon the doctrine of dedication of land to the public, in the case in question a public square. The arguments of the able counsel in this case are printed at length, evidently from their briefs, which, however, might possibly have been somewhat condensed without impairing their force or obscuring the learning which they contain.

Princeton Bank v. Gibson, p. 138, and subsequently affirmed in the Court of Errors, established a principle of some importance. It was held that an action on the *case* will not lie by a landlord against the plaintiff in execution for procuring a sheriff to sell and remove goods of a tenant on which the landlord had a lien for rent. The Chief Justice who delivered the opinion of the court laid down this proposition, that for injuries not amounting to a trespass, and for which the only remedy is a special action on the *case*, the action must be brought against the party actually committing the wrong. In such cases there can be no accessories: no aiders and abettors against whom separate actions can be brought as in trespass.

Crozer & Moore v. Chambers, p. 257, is upon the effect of the indorsement of a third person not a party upon a promissory note, in which the doctrine of some of the late New York cases seems to be followed. It was held that *per se* it created no implied or commercial contract whatever; though it might subject him in the hands of a bona fide holder to the liabilities of a second endorser. It seems to have been held that there was no authority to write a special guarantee over the signature, which would be to repeal the statute of frauds; but whether the endorser upon proper proof might not be held as co-promisor, was left unsettled.

Kip v. Berdan, p. 239, is a case in which, with all respect to the court, both upon authority and principle, the dissenting opinion of Justice Nevins seems to be the better law.

Distmough v. Bidleman, p. 275, affirmed in the Court of Errors, settles a very important point under the New Jersey statute, limiting actions upon specialties, and which is not of very common occurrence, against a very learned and elaborate opinion of the Chief Justice.

Stone v. The State, p. 404, sustains against the decision in O'Connell's case, which it regards as partaking too strongly of political character and feelings to entitle it to much consideration in the courts of this country, the principle that one good count is sufficient to sustain an indictment, the other counts being defective, even on error.

Dorr & Sarton v. Hunt, p. 487, is a carefully written judgment upon

the question of adverse possession, a case which was ably argued by the first counsel then at the bar, (H. W. Green, now Chief Justice, with whom are Gov. Haines on the one side, and Gov. Vroom on the other,) but it will probably never receive the attention it merits from the exceedingly defective manner in which it is reported. Not only the points taken by counsel are not given, nor the authorities cited, but there is no statement of the case except the imperfect one which is contained in the opinion itself. The opinion, however, will well repay a careful examination.

THE JURISDICTION, LAW AND PRACTICE of the Courts of the United States in Admiralty and Maritime causes, including those of Quasi Admiralty Jurisdiction, arising under the act of February 26, 1845; with an Appendix containing the new rules of Admiralty practice prescribed by the Supreme Court of the United States, with numerous practical forms, &c. By Alfred Conkling, Judge of the United States, for the Northern District of New York. Vols. 1 and 2. Albany: W. C. Little & Co., law booksellers, 53 State Street. Boston: Charles C. Little and James Brown, 112 Washington Street, MDCCCXLVIII.

This is an excellent book; matter and manner, editorial and typographical execution of the very best character. We have read it pretty carefully and most gratefully make our acknowledgment to the author for the real sound learning, good judgment, and careful elaboration which mark the volumes. Courts of admiralty are always pleasant places to practice, because of the high character of the Judges who preside over them, and of the pliable and common sense character of the law as administered in them. The admiralty practitioner will hail this book with satisfaction; heretofore the proctors have been instructed only by Mr. Chitty, in his *General Practice*, where the subject is confused and fragmentary; by *Marriott's Formulary*, a good book of precedents prepared with neatness and perspicuity, by an Admiralty Judge, the immediate predecessor of Sir William Scott; by *Clarke's Praxis*, a work of undoubted credit, but not commonly in the hands of the profession; and by *Browne's Compendious Views of the Civ. & Adm. Law*, a manual for students, often cited and always with respect, but somewhat too philosophical and brief for practical use. These, with *Dunlap's Admiralty Practice*, an excellent book but out of print, constituted the admiralty proctor's library of elementary and text books; none of them save the last is at all well adapted to the every day wants of the profession, and all the English ones more or less unsuited for our American Marine Courts. Hence the practice was an unknown thing to all save the few

whose daily walks were in the Instance Courts ; the profession generally, even in the seaports, were but little versed in the mysteries of these tribunals. Judge Conkling's book was therefore greatly needed. The only work in Ad. Pract., commonly found on shelves of the profession in this country, was the before mentioned work of Mr. Dunlap, certainly a learned, accurate and well digested book as far as it went, but it was never completed by its lamented author, and was sent forth to the world unfinished and by the hands of another. It is now wholly out of print, and a vast number of statutes and decisions have accumulated since the date of its publication.

Judge Conkling has divided his work into first *Admiralty Jurisdiction* second, *Admiralty Practice* : third, *Admiralty Precedents* ; an arrangement both natural and convenient. Under each head he has left little to be done ; the law is fully and carefully stated ; the cases are all cited and commented on ; the principles are well digested and adequately set forth. Neither learning nor diligence have been wanting by the learned author, All the acts of Congress are given, both the old and the new, and the cases arising under, and expounding them. Special attention has been given to the act of Congress of February 26, 1845, extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same. The rules of practice in the United States Admiralty Courts are also given—indeed the admiralty proctor will here find each step marked out for him in the conducting of any cause of contract, civil and maritime.

We cheerfully and heartily commend the learned Judge's thorough and important labors to our brother proctors as furnishing needed aid on subjects and in causes where substantial help will be looked in vain elsewhere.

We cannot close this notice without commending the typographical execution of the book ; the printers deserve much credit ; the large leaded type, and above all, the running marginal notes on each page, greatly facilitate reference and lighten the hurried practitioner's labors ; the paper is also of good quality, not blue or dingy or partly colored, but white and fair. We are fully satisfied that the profession will esteem these volumes a substantial addition to the permanent literature of the law, and will award to the learned author the just praise which solid forensic attainments ever command.

THE MORAL, SOCIAL AND PROFESSIONAL DUTIES OF ATTORNIES AND SOLICITORS. By Samuel Warren, Esq., F. R. S. of the Inner Temple, Barrister-at-Law. William Blackwood & Sons, Edinburgh and London: William Benning & Co., London. 1848.

We have read this little book through with the highest degree of satisfaction. It consists of four very interesting lectures delivered by the author before the Incorporated Law Society of the United Kingdom, in the Hall of the Society, in June last. It is full of most excellent matter for the guidance and instruction of the younger members of our profession. Its tone is of a dignified, manly, independent, moral, high-minded character. It is evidently written *currente calamo*, from its occasional carelessness and colloquial character of expression; it contains many anecdotes, and some pleasant professional gossip about distinguished members of the bar. We commend its pages to the attentive consideration of the junior members of our profession, as containing words of wisdom and lessons of manly value for the sharp conflicts in which advancing years will of necessity engage them.

COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW, and Statutory and Constitutional construction, containing an examination of adjudged cases on constitutional law, under the Constitution of the United States, and the Constitution of the respective States, concerning Legislative power, and also the consideration of the rules of law on the construction of Statutes and Constitutional Provisions. By E. Fitch Smith, Counsellor-at-Law. Albany: Published by Gould, Banks & Gould, Law Booksellers, 104 State Street; and by Banks, Gould & Co., 144 Nassau Street, New York. 1848.

This is a very handsomely printed volume of nine hundred and seventy six pages, upon subjects of the greatest and gravest practical importance, not only to our profession, but almost equally so to laymen. The book contains twenty-one chapters, beginning with the origin and history of Legislation. It appears to be peculiarly valuable from the number of authorities cited, and the intrinsic interest of the subjects discussed.—The mechanical execution of the book is unusually good; the paper is fair; the type large and leaded; and the sub-division of the book into sections, after the manner of the continental writers, and some of the best of our own, greatly facilitates the ease of reference and is a desirable improvement in the art of book-making.

We trust that another edition of this work will not be permitted to go to press without a *table of cases*; any law book is defective that wants this; none should ever be issued from the press without such a table carefully and accurately prepared. It greatly aids the laborious and diligent student in his inquiries, and is of the first importance to all who have occasion to consult a law book.

Supreme Court of Pennsylvania.***Additional Abstracts of Decisions in the Western District.***

Oliphant v. Frost.—A bond paid into Court by consent of creditors in lieu of amount of Sheriff's sale, as cash, does not bear interest. Oct. 26.

Bask. v. Bask.—A contract for testamentary compensation for work done for a father by a son, after his majority, can be proved only by "*direct and positive*" evidence of it. "*Clear and satisfactory*" evidence is not sufficient, as this places it on the footing of a contract between strangers, unaffected by any personal relations.

This court has held a tight rein over the quality, if not the sum of proof, which is a subject of inspection and governance by the courts, because every sane man must be allowed to make his own contract as well as his own will, and the above rule is necessary to prevent jurors from making it for him, according to their own notions of fitness and propriety.

A son claiming compensation from the father for work &c. is not estopped from claiming its value in assumpsit, by resisting a petition for partition of the land to which he claimed title as a compensation for said work.

A mistake in choosing the forum, or the form of proceeding, cannot prejudice a party in seeking his true remedy.—The law implies no promise to pay which will support a general count in favor of an adult son who continues to serve his father, but such count may be supported by an express promise to pay according to the value, without any express assessment of it before hand. Per Gibson, C. J. Nov. 10.

Springer v. Brown.—Sale of land under a *f. fa. and vend. exponas* issued after defendant's death confers a good title, although against the property of a deceased defendant who was originally but a surety, and although the principal debtor surviving had assets out of which the debt might have been made. Per Gibson, C. J. Nov. 16.

Graham v. Graham.—Notice of an umpirage is waived by a communication declining to attend, if accompanied by a paper to the arbitrator, with instructions to lay it before the umpire in order to bring into his view certain accounts which the party feared might be overlooked.

Before an umpire has made his award he is bound to examine the witnesses, if the party require it, but not without request or afterwards, (*Hall v. Lawrence*, 4 T. R. 589. *Tunno v. Bird*, 2 Nev. & Manning, 328, s. c. 5 Barn & Ald. 488.)

A submission of disputes, difficulties and controversies growing out of partnership dealings and accounts, includes receipts by, and payments to a partner, up to the time of the award, especially if it were agreed that one of the partners should take the books and make collections from the debtors of the firm and payments to its creditors.

An arbitrator or umpire *may* prove facts coming under their notice in the progress of the hearing. But *quere* whether he is bound to be worried afterwards as a witness. If he does not object no one else can. Per Gibson, C. J. Nov. 20.



THE CONCLUSIVE PRESUMPTION OF SURVEY.

In *Collins v. Barclay*, 7 Barr, 73, Mr. Justice Burnside says, that it was in *Lambourn v. Hartswick* that Mr. Justice Duncan first *broached* the doctrine that where a survey had been returned twenty-one years, and the

owner had paid the taxes, it was *worthy of all consideration* whether it ought not to be a presumption of law conclusive of the fact that the title was legal and perfect.—“The very point,” continues Mr. Justice Burnside, “came before the court in *Nieman v. Ward*, 1 Watts & Serg., 68, where the court rule, on *great deliberation*, that a return of survey into the Surveyor General’s Office, and a lapse of twenty-one years afterwards, without any attempt made during that time to except or object to it, such return is conclusive evidence that it is regularly made.” In this statement there appears to be some mistake or omission of material facts. The case of *Neiman v. Ward* was determined in 1841, and the “very point” which is stated to have been there decided, upon “*great deliberation*,” instead of being the point in the cause, was only referred to *incidentally* as a familiar principle which had passed into a rule of property under the sanction of two solemn decisions of the Supreme Court six or seven years before. It is true that Mr. Justice Duncan first *broached* the principle and spoke of it as “*worthy of all consideration*.”—But its *first recognition as a rule of property* occurred under the following circumstances: In the year 1834, the case of *Spring v. Caul* came on for trial before the Common Pleas of Northumberland county. The plaintiff claimed, under a survey of the 12th March, 1794, which had been duly returned and patented. The defendant claimed, under a survey of the 16th March, 1815. The lapse of time between the two surveys was *twenty-one years and four days*. Alexander Jordan, Esq., and the late Judge Donnel, were counsel for the plaintiff; Samuel Hepburn, Esq., and the late E. G. Greenough, Esq., were counsel for the defence. In the argument *to the jury*, Mr. Jordan, (remarking upon the injustice of permitting the Commonwealth to sell the land a second time, thus depriving the first purchaser of his property, because

her own officer had not marked the lines upon the ground as required by law,) declared that he "*believed it ought to be decided as the law, that no survey could be impeached on this ground, after the lapse of twenty-one years,—a period analagous to the statute of limitation.*" This was said, as we before stated, not to the *court*, but in *argument to the jury*; and Lewis, President, thereupon remarked: "Mr. Jordan, if you desire such a charge, you shall have it." Upon a moment's consultation with his colleague, the case was put upon the point of law—all further argument was suspended by common consent, and the court, taking the case from the jury, instructed them as matter of law, that "*the return of survey, the patent, and the lapse of time, entitle the plaintiff to a verdict. Upon the whole evidence given he is, IN LAW, entitled to recover.*" But for the *lapse of time*, the plaintiff's survey was incurably vicious, because it was proved by the surveyor who made it, that his whole work was performed *at a tavern in the city of Philadelphia*, and that he had never "*made a mark or stretched a chain upon the land.*" The case went at once to the Supreme Court, and as it was well known that Mr. Bellas was largely interested in the *new* surveys and against the *old* land titles in the Shamokin coal region, he was permitted to be heard, and was heard, in a long *oral* and *written* argument, although not directly concerned in the case. But, upon full consideration, the principle which had been only *broached* by Mr. Justice Duncan, as worthy of consideration, and for the first time in Pennsylvania held, (by Lewis, President,) to be sound law, received the hearty concurrence of Mr. Justice Rogers, who delivered the opinion of the Supreme Court, in *Spring v. Caul*, 2 W. 390; and the judgment of the court below was accordingly affirmed in July, 1834. Afterwards, in 1835, when one of the causes of Mr. Bellas came on to be tried, he attempted to impeach the plain-

tiff's return of survey, by showing that "no survey was ever made upon the ground;" but, as the plaintiff's survey was more than 21 years old, before the defendant's title commenced, and as the principle had been already settled in *Spring v. Caul*, that it could not be impeached in the manner proposed, the evidence was *rejected as altogether irrelevant*. In rejecting the evidence, Judge Lewis, in an opinion filed of record, *placed the decision of the court distinctly upon the principle that the presumption in favor of the return of a survey, remaining undisputed for the period of twenty-one years, was absolutely conclusive*. That decision was affirmed by the Supreme Court in July, 1835, Mr. Justice Kennedy delivering the opinion of the court, six pages in length, and distinctly stating, in that opinion, that the very question had been decided in *Spring v. Caul*, *vide Bellas v. Levan*, 4 Watts, 297. These decisions received the universal approbation of the profession and the people.— They advanced the cause of justice, arrested fraudulent speculations, closed the flood-gates of litigation, and gave certainty to titles, and thus promoted the investment of capital, the development of the wealth of our mineral regions, and the general improvement and prosperity of the country. The principle adopted was in accordance with all the analogies of the law, and no question was afterwards raised in regard to its soundness. Under such circumstances, it would be placing the learned Judges of the Supreme Court in a most unfavorable light to represent them as engaged, *in the year 1841*, in "great deliberation" upon a point which they themselves had twice solemnly settled at least six years before, and which was notoriously familiar law to the humblest tyro in the profession. Such an idle waste of time would have been worthy of the Horn-book and the school-master's birch.

The well known familiarity of Mr. Justice Burnside with the land law of the State relieves him from the

slightest imputation of ignorance of the history of this question, and the mistakes liable to occur in the press of business free him from any intention to misrepresent the facts. The reference to the case of Nieman & Ward, instead of the one he intended to cite, was doubtless a mistake which might readily occur amid the multiplicity of citations by counsel. And we only draw attention to the subject for the purpose of preserving the true history of the origin and progress of one of the most important principles in our land law which has ever been decided.

Medical Jurisprudence.

CHLOROFORM, &c.

The 1st volume of the Transactions of the American Medical Association, instituted in 1847, has made its appearance. It is an octavo volume of more than 400 pages and contains a mass of valuable information.—The report of the committee on Anæsthetic agents is highly interesting. From this report it appears that "a portion of the committee believe that the facts now before the profession have fully established etherization as a powerful, highly useful, and practicable means of annulling pain, *if judiciously employed*;" while "another portion do not feel prepared, from the evidence presented, to recommend the use of these agents."

It is clear, from the evidence laid before the Association by the committee, that *sulphuric ether*, although not so immediate in its effects as *chloroform*, is much less frequently attended with disastrous results. But the many sad consequences which have been produced by the exhibition of these agents constrain us to believe that the use of either of them, except in desperate cases or where the system without their aid is unable to sustain the shock of the necessary surgical operation, is extremely "*injudicious*," if not positively dangerous as well to the physician as to the patient.

A death from air entering a vein divided whilst inserting a seton in the neck, occurred recently at Barnes, near London. In a highly respectable Medical Journal it is called an "accident," and in the usual steam-boat-explosion language, it is added that "no blame can be attached to the operator." The circumstances of the case are not stated, but we fear that it is not as well understood as it should be that the division of a vein, in the neighborhood of the heart, is attended with dangers which might produce something more than an "accident." If a pump-maker were to perforate a pump-stock, under the piston, the admission of air, and the consequent cessation of the flow of water, could scarcely be called an "accident" which would discharge the workman from "blame." We remember with pain a death which occurred at Harrisburg some years ago, from dividing a vein in the breast. We know nothing of the circumstances and of course do not impute blame to the operator. But in the administration of *Legal Medicine* we know not what a court and jury might do, in cases where no pains were taken to guard against the "accident," or where the operator appeared to have no sufficient knowledge of the danger to which he was exposing the patient.

CONSTITUTIONAL LAW.

The Governor.—Upon the resignation of Governor Shunk, the Hon. William F. Johnston, Speaker of the Senate of Pennsylvania, was vested by the Constitution with the power to "exercise the office of Governor." As the Senate will meet on the *first* Tuesday in January next, and as the Governor elect will not be inaugurated until the *third* Tuesday in January next, the distinguished Senator from Armstrong, will necessarily perform the double duty of Speaker of the Senate, and Governor of the Commonwealth.

The Attorney General.—The Hon. James Cooper, the Attorney General of the Commonwealth, has, since his appointment, been elected a member of the House of Representatives. By the Constitution, it is declared that no person holding any *office*, (except of attorney at law and in the militia,) under this Commonwealth, shall be a member of either House, during his continuance in office. This provision of the Constitution, because in derogation of the rights of the people to select their own public servants, has always received a strict construction. The object was to prevent the distribution of power among the different departments from being destroyed, and the checks which each had upon the other from being impaired." The departments of government are either Legis-

lative, Executive or Judicial; and neither the letter or spirit of the Constitutional restriction applies to those agents of the State, who are not entrusted with any portion of the sovereign power, and who, therefore, belong to neither of these three departments. A State acts in a double capacity:—as a *sovereign* and as an *individual*. She acts as a *sovereign* when she exercises either the *law-making*, the *law-executing*, or the *law-expounding* power, and the agents entrusted with the exercise of these powers, are properly called *officers*. But the persons employed by her in performing acts which an *individual* or *corporation* may perform, are not *officers*. The individuals entrusted with the management of her law suits, when she, as a party, disrobed of her sovereignty, and, like an individual, is humbly suing for justice, are not *officers*, but merely *attorneys at law*, and consequently may be members of the Legislature. Chief Justice Gibson, I. D. Bernard, Philip S. Markley, and Mr. Farrelly, were Deputies of the Attorney General, and Ellis Lewis was Attorney General, and all of them were, at the same time, members of the Legislature. The same may be said of Mr. M'Arthur, General Piper, Mr. Dale, Col. Orr, and Mr. Hyneman, all of whom were Deputy Surveyors, but their duties involved no exercise of the sovereign power. Gen. Rogers was collector of tolls and member of the Senate, upon the same principle. So that we perceive no Constitutional objection to the exercise of the duties of both offices by Mr. Cooper. In this view of the case, the next meeting of the Legislature will present the singular coincidence that while the acting Governor will be a member of the Senate, his Attorney General will be a member of the House of Representatives.

JUDICIAL APPOINTMENTS.

We subjoin a list of the President Judges of Pennsylvania, with the dates of their respective commissions.—We have designated with a star (*) those whose commissions expire during the administration of Governor JOHNSTON.

Hon. Edward King, President 1st District, app'd 28th February, 1842.

Hon. Ellis Lewis, President 2nd District, app'd 14th January, 1843.

Hon. James Pringle Jones, President 3rd District, appointed March 13th, 1847. ,

*Hon. George W. Woodward, President 4th District, appointed, 9th April, 1841.

*Hon. Benjamin Patton, President 5th District, app'd 20th March, 1840.
 Hon. Gaylord Church, President 6th District, app'd 3rd April, 1843.
 Hon. David Krause, President 7th District, app'd 31st January, 1845.
 Hon. Joseph B. Anthony, President 8th District, appointed March 23rd, 1844.

*Hon. Samuel Hepburn, President 9th District, app'd 5th March, 1839.
 Hon. John C. Knox, President 10th District, app'd 11th April, 1848.
 *Hon. William Jessup, President 11th District, app'd 7th April, 1838.
 Hon. Nath'l. B. Eldred, President 12th District, app'd 30th March, 1843.
 *Hon. John N. Conyngham, President 13th District, appointed 25th March, 1839.

Hon. Samuel A. Gilmore, President 14th District, appointed 28th February, 1848.

Hon. Henry Chapman, President 15th District, app'd 18th March, 1848.
 Hon. Jeremiah S. Black, President 16th District, app'd 30th March, 1842.

Hon. John Bredin, President 17th District, app'd 28th February, 1842.
 *Hon. Alexander McCalmont, President 18th District, appointed 31st May, 1839.

Hon. William A. Irvine, President 19th District, appointed 6th February, 1846.

Hon. Abraham S. Wilson, President 20th District, app'd 30th March, 1842.

Hon. Luther Kidder, President 21st District, app'd 23d January, 1845.

JUDGES OF DISTRICT COURTS.

Hon. George Sharswood, President of the District Court, composed of the city and county of Philadelphia, appointed 1st February, 1848.

Hon. John K. Findlay, Assistant, " 2nd April, 1845.

Hon. George W. Stroud, " " 5th February, 1848.

*Hon. Alexander L. Hayes, President District Court of Lancaster, appointed 1st May, 1840.

Hon. Hopewell Hepburn, President District Court of Allegheny, appointed 17th February, 1847.

Hon. Walter H. Lowry, Assistant, appointed 17th February, 1847.

Associate Judges of the Court of Common Pleas, in and for the City and county of Philadelphia :

Hon. James Campbell, appointed 2d April, 1842.

Hon. Anson V. Parsons, " 13th February, 1843.

Hon. William D. Kelly, " 8th March, 1847.

✍ *The New York Legal Observer*.—We have received a note from Samuel Owen, Esq., the editor of the *New York Legal Observer*, complaining of injustice arising from the re-publication in this Journal of the statement made in the *New York Code Reporter*, of September last, respecting the discontinuance of the *Observer*. The insertion of Mr. Owen's note would not comport with our ideas of propriety, but it gives us unfeigned pleasure to learn that his valuable periodical has not been discontinued, and to assure him and the public of our disposition to repair, by all the means in our power, any injury which we may have unintentionally committed by re-publishing, on the authority of the *Code Reporter*, what we supposed at the time to be a correct statement of facts. It may serve as a further explanation to state that we have not seen a number of the *Legal Observer* since the February number, 1848.

Read's Female Poets of America, published by E. H. Butler & Co.—This work is a credit to the country, and is especially worthy of the painter-poet of America, THOMAS BUCHANAN READ. It contains biographies and selections from the productions of the most distinguished of our female poets, and portraits of many of them, engraved from paintings by Mr. Read himself. The likeness of "Grace Greenwood" is appropriately given in full riding costume, inasmuch as she is distinguished, as well for "handling the ribbons" as for wielding the pen, and has conferred a great public benefit by her condemnation of the present ludicrous and dangerous female riding dress, and her courageous recommendation of the Turkish trousers and the Blouse, somewhat similar to the beautiful bathing dress worn at the sea shore. In looking over Mr. Read's portraits, we recognize one particular face, which is so life-like, and so correct, that we think we see the original by our side, feel the inspiration of her ethereal presence, and her "Spirit of Song," and hear the thrilling sounds of her magnificent address "To the Eagle":—

"Where the great cataract sends up to Heaven
Its sprayey incense in perpetual cloud,
Thy wings in twain the sacred bow have riven,
And onward sailed irreverently proud."

✍ We renew our thanks to our friends for their increasing subscription and advertising patronage. Within the last two weeks we received nearly forty subscribers from Buffalo alone.

THE
AMERICAN LAW JOURNAL.

JANUARY, 1849.

MORTIMER LIVINGSTON v. THE STEAMBOAT EXPRESS.

U. S. Circuit Court, in Admiralty, Nov. 12, City of New York.

1. Where the helm of the tow was under the direction of her Captain, and all other means used in the navigation of the boat were under the control of the master of the tug, the power of the tug over the navigation of the tow is paramount and controlling, to which a corresponding responsibility necessarily attaches, in case the tow is brought into collision with another vessel.

2. In such case the whole duty of the tug is not discharged when she is so navigated as to avoid committing, immediately, an injury by collision with another vessel herself; she must guard, so far as fairly lies within the power she exercises over the colliding vessel, against the danger of any injuries being committed by the latter: otherwise the tug is responsible for the damage.

Mr. Justice Nelson delivered the opinion of the Court :
This is a libel filed by the owner of the yacht *Mist* against the steamboat *Express*, for damages occasioned by a collision occurring in this port. The *Mist* was lying at anchor off Whitehall dock, at the usual anchorage ground for vessels of that description. The steamboat had just taken in tow a canal boat, heavily laden with coal, at one

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of the North River piers, for the purpose of carrying her round to the East River, there to be taken, with other boats, in tow to Albany. The canal boat was towed by a hawser some fifty fathoms in length, fastened to the stern of the steamboat, and, on coming round from the North to the East River, the latter passed on the inside of the Mist, between her and the Battery. As she came round Castle Garden, the boat in tow took a sheer out into the river, which the captain and a hand on board of her, with all their exertions at the helm, could not break, by reason whereof she came in contact with the Mist, head on, abaft the forward chains, and stove in her plank and timbers, besides doing other serious injury. The captain of the tug was warned by the master of the tow, at the time she was lashed to the stern, that the boat steered badly, especially when heavily laden, as she then was, and a request made that she should be taken alongside, instead of being towed at the stern; but this was refused, and a hawser flung to him, to lash her astern. The tug was not under the command or direction of the master of the tow, but under the command and direction of her own captain and hands. The tow was steered under the direction of her captain. The collision took place about 5 o'clock, P. M., of the 18th October, 1845, in calm and pleasant weather, the tug having in tow no other vessel besides the canal boat. The sheer of the tow commenced, according to the clear weight of the evidence, as soon as the tug straightened up in her course from the North River piers, or as she was coming round Castle Garden; and it continued widening from the track of the tug, notwithstanding the exertions of the captain and hands on board until the collision occurred. There is very little doubt, if any, that it was seen by the hands on board the tug, soon after it commenced, and that it was also seen that it was not in the power of the master, with all his efforts, to break it;

and yet no measures were taken to arrest the sheer, or to avoid the danger, which must have been apparent. On the contrary, the tug continued her course, at a speed of from six to eight miles an hour. It is true, the hawser was paid out from the tug some ten or fifteen fathoms; but this was not for the purpose of arresting the sheer, but of increasing it, so that the tow might be enabled to pass the Mist on the opposite side from the tug.

Under these circumstances, though the master of the tow may have been in fault for want of proper skill or attention in steering his vessel, and, therefore, properly responsible for the collision—we are of opinion the captain of the tug was also in fault, for not taking earlier measures to avoid it, by stopping his vessel. There can be no reasonable doubt, upon the evidence, but that the collision might have been avoided, if proper attention had been paid to the navigation of the tug; and, after the captain had been warned that the tow steered badly, and was requested, for that reason, to take her alongside, it was his duty, in passing round among the vessels lying at anchor in the bay, to have kept the strictest watch over the tow, and to have seized the first moment of apparent danger for the purpose of arresting the sheer and preventing the collision.

An idea seems to have been entertained on board the tug, that if she was not in fault, as respects her own navigation—that is, if she was so navigated as to avoid coming in contact with the damaged vessel—no responsibility could be properly attached to her; that it then rested exclusively upon the vessel in tow, to whose bad navigation the collision was immediately attributable. This, we apprehend, is a mistake. The tug is also responsible, if the damage could have been avoided by the exercise of reasonable skill and attention on her part. The navigation of the tow is dependent upon, and controlled by, the

navigation of the tug ; and it may not unfrequently happen that the joint action of the hands on board of both vessels, is essential to prevent the happening of a collision by the former. In all such cases, at least there exists a common obligation to make every reasonable effort to avoid the danger, and a common responsibility in case of neglect. The case before us is one of this description. Whether the sheer happened at first by the fault of the master of the tow or not, it is quite plain that he and the hands on board were unable to break it and bring the vessel back to her proper track without the aid and co-operation of the tug ; that, we think, might have been rendered in season to have avoided the disaster if proper attention had been given to the condition of the tow, and such attention should have been bestowed, especially after the warning that had been given to the captain in respect to the bad navigable qualities of the vessel. By consenting to take charge of her under these circumstances, and particularly taking her in tow by a stern hawser, after the admonition, the captain became, measurably, responsible for her navigation, or, at least, for extraordinary care and attention to her navigation in the passage from river to river among the vessels in the bay.

The business of towing vessels by steamboats is comparatively modern, and has become extensive upon all the navigable rivers of the country. The obligations and responsibilities arising out of this kind of navigation, and properly resting upon the respective vessels concerned, are novel and peculiar ; and there may be some difficulty in assigning to each vessel its proper measure of responsibility—a difficulty that is intrinsic arising out of the peculiar relations which the respective vessels bear to each other in the course of the navigation. In all cases where the tug is under the direction and control of the master and hands on board of the tow, there is no diffi-

culty in assigning to the latter a responsibility for all the damages that may happen through the fault of either vessel ; and the converse of the proposition will hold equally good, where the tow is under the exclusive direction and control of the tug. But where there is a divided command and direction in the navigation of the vessels, there must necessarily be, in some measure, a divided and separate responsibility assigned to each. What that measure shall be, is a question of some difficulty. In the case before us, the helm of the tow was under the direction of her captain ; all other means used in the navigation of the boat were under the absolute control and direction of the master of the tug ; and such is understood to be the common relation which these vessels bear to each other in the business of towing up and down the North River.

Now, although the tow, her master, and owners, are properly chargeable for any injuries that may happen by reason of neglect or unskilfulness in her management, in the course of the voyage, it by no means follows that the tug is free from fault. Her power over the navigation of the tow is paramount and controlling, to which a corresponding responsibility necessarily attaches ; and in all cases, where the proper and reasonable exercise of that power can be interposed for the purpose of arresting and avoiding the injury impending, she should be held responsible for its faithful exertion, and answerable in case of neglect. Her whole duty is not discharged when she is so navigated as to avoid committing immediately the injury herself ; she must guard, so far as fairly lies within the power she exercises over the colliding vessel, against the danger of any injuries being committed by her. In this very case, if the master of the tow had had the control over the motive power himself, he might have avoided the collision, notwithstanding the sheer of his vessel. Seeing and apprehending the danger, he would, as would

have been his duty, stopped the vessel at once, and have thus arrested the dangerous consequences of the sheer, whether it arose from the fault of the helmsman or of the navigable qualities of the canal boat. The motive power being entirely under the control of the tug, this duty devolved upon the master and hands of that vessel, and the neglect to discharge it properly, under the circumstances and in the emergency, fairly enough subjects her to accountability for the damage that happened. We are of opinion, for these reasons, that the decree below should be reversed, and that the case be referred to the clerk, to ascertain and report the amount of the damage sustained.



MARTIN LEWIS, PERMANENT TRUSTEE OF WILLIAM HOULTON,
AN INSOLVENT DEBTOR, v. FRANKLIN GARDNER.

In Baltimore County Court—Action of Trover.

1. The laws of a State have no extra-territorial operation, even between citizens thereof, so as to authorize the permanent trustee, under an insolvent law of one State, to recover the personal property of the insolvent, situate and sold in another, in payment of a debt.

2. But duress of goods, may, under certain circumstances, amount to a fraud which would vitiate such sale, and render such purchaser liable to an action of trover, at the suit of such trustee, in the Courts of the State in which the proceedings under the insolvent law took place.

OPINION OF JUDGE LE GRAND.—The facts of the case are as follows:—William Houlton, (whose permanent trustee under our insolvent system the plaintiff is,) was conducting business in the city of Washington, the town of Petersburg, and in the borough of Norfolk, Va. On the 4th June, 1845, being unable to meet, at maturity, his engagements, many of which were about to fall due, he

desired an extension of time from his creditors, believing as he says, he was perfectly solvent. With this view he convened a meeting of his creditors. The defendant, (one of his creditors,) according to the evidence of Houlton, did not attend, alleging as a reason for his absence, that he would be compelled to leave at the hour of the day when the meeting was to be had to attend as a witness at Cumberland, but that he would be represented at such meeting by Mr. Johnson, his clerk, who would be instructed to act on the most favorable terms towards Houlton. At the proposed meeting, the plaintiff, as one of the creditors of Houlton, and Johnson, as representative of defendant, attended. No extension of time was allowed because Houlton had not then with him an exhibit of the condition of his affairs; but it was agreed, according to the testimony of Houlton and Hack, by Lewis and Johnson, that Houlton should proceed to Washington and sell out there, and then proceed to Petersburg and Norfolk, take an inventory of his goods and return to the city of Baltimore within five days, when, on its exhibition, the creditors would determine what was to be done, but during that time *no legal proceedings should be had by his creditors*. In pursuance of this understanding, Houlton went to Washington; but the defendant instead of going to Cumberland, proceeded to Norfolk, where he caused an attachment to issue against the property of Houlton, as that of a non-resident debtor. Having done this, he proceeded to Washington, where he found Houlton engaged in effecting a sale of his goods there, and by means of threats induced Houlton, according to the testimony of the latter, to give him an order for the goods which had been attached, at Norfolk, and also, some of the notes made by the purchasers of the goods at Washington. This took place on the 5th June, and on the 12th of the same month Houlton applied for the ben-

est of the insolvent laws of this State, and on the 4th the plaintiff was appointed his permanent trustee. This action is brought to recover the value of the goods and of the notes.

On this state of facts, it is said, the plaintiff is entitled to recover, because of the fraud of Gardner,—in other words, no title passed to him, and that the title rested in his permanent trustee.

On the part of the defendant it is denied there was any fraud in his proceedings, and insisted upon, in his behalf, that he was invested with a legal title to the property in question :—*that inasmuch as the proceeding took place out of the State of Maryland, our laws in regard to insolvent debtors can have no effect in relation to it.*

In regard to this last question, there has been and still is, a difference of opinion among the jurists of our country. In England, it has always been held, that so far as the citizens of that country are concerned, they are bound to look to the assignees of the bankrupt for their distributive share of his estate, and whatever may be obtained by them. beyond their country, by proceedings against the property of the bankrupt situate without the country, can be recovered from them by the assignee ; the decisions to this effect resting on the doctrine that as subjects of Great Britain they owe allegiance to its laws and their policy, and therefore, as between them and the assignees, their proceedings are not to be considered with reference to the law of the actual situs of the property, but in regard to the country to which they all owe allegiance. In some cases, both in this country and in England, it has been sought to be established, that the assignees in bankruptcy are invested with the absolute title to the property of the bankrupt against all persons, whether British subjects or not. This doctrine, however, has never received any countenance from any of the courts of this country ;

the only question here being, whether the bankrupt laws of England as between subjects of that country, and the insolvent laws of a sister State as between its citizens, govern the acquisition of property situate beyond its limits, which is sought to be acquired in violation of the law of the country, or of the State of which they are subjects or citizens, as the case may be ; and in regard to this question there has been a difference of opinion. Some of the courts holding that as between citizens of the same State, the laws of their domicile must govern the contract, whilst others hold the opposite, insisting that the laws of a State have no extra-territorial operation even upon its own citizens. The case of *Johnson v. Hunt*, 23 Wendall, 87, maintains most clearly, this doctrine. It was a case, so far as this question is concerned, almost identical with the one now before the court. In my apprehension the question has never been decided in *this State*.

I am aware that the case of *Buck & others v. McClain*, 1 H. & M'H. 236, is generally supposed to have decided that *English* creditors were bound by the statute of bankruptcy and could not attach the effects of the bankrupt in the Province of Maryland. If this decision was made independently of the local legislation of the Province of Maryland, as is generally supposed, then it would be conclusive on this question, for in my judgment the case of *Wallace v. Patterson*, 2 H. & M'H. 463, does not touch the question, for there the attaching creditors were citizens of Maryland, and although one of them *resided* in England he was still a *citizen* of Maryland, and entitled to his rights as such. In the case in 1 H. & M'H. there is no opinion of the court filed ; but it appears from the report, brief as it is, that the act of 1704 ch : 39, was cited in argument by the counsel who moved for the dissolution of the attachment. Now, that act of the Province, by a just construction, would have justified the

action of the court, for by it the property of the bankrupt in the Province was vested in his assignee, and of course to be distributed by him according to the statutes of bankruptcy, the only reservation being that it should not interfere with Provincial creditors whose claims accrued *after* the arrival in the Province of the goods &c. of the bankrupt. It appears to me, that by this act, independently of the general principle, *English* creditors had no right to maintain attachments against the effects of the bankrupt in this Province. As I understand the opinion of Mr. Dulany, published in connection with the case, the whole matter was decided on a construction of the act of 1704 ch: 39. After alluding to certain considerations, he says, "it has been determined on a construction of the *act, &c.*" What act? Again, he says, "the country creditors proceeded by attachment, and obtained condemnations, but an attachment obtained by a *British* creditor was set aside, the *act* being understood to be limited to country creditors, &c." From this, it is clear, that the case was decided under the act of 1704.

This being so we must look to general principles. It has been conceded in several of our States, that the assignee of a foreign bankrupt may sue in our courts. This undoubtedly admits the bankrupt laws of England to have some operation in our country, and this admission, says Justice Story, (Conflict of Laws, section 420,) "unless it can be overthrown surrenders the principle, for no one will contend that the assignees can sue either in law or in equity in our courts, unless they possess *some* title under the assignment." I am aware of the comprehensive language of Chief Justice Marshall in *Harrison v. Sterry*, 5 Cranch 289, where he said the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States." But, says Story, (Conflict of Laws, section 421,) "the very terms of the

statement show, that the court were examining the point, only as between the conflicting rights of the assignees and those of the attaching creditors, and not in relation to the bankrupt himself; and this was manifestly the light in which the doctrine was contemplated by the majority of the court in a subsequent case."

The purport, then, of these decisions is, as I understand them, *that as against attaching creditors* the bankrupt laws of a foreign country have no operation here, but they have operation so far as the bankrupt and those who hold effects for him are concerned.

In the case of *Ogden v. Saunders*, 12 Wheaton 364, it is said by Justice Johnson that he considered it "fully established, that in the United States a creditor of a foreign bankrupt may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignee or other creditors." But in saying this the learned Judge is not to be considered as referring to rights of assignees created by voluntary assignments, but to assignments *in invitum*, and by force and operation of law. The assignments under our insolvent system are not *in invitum* but voluntary, because the application of the insolvent is of his *own motion*, and not an involuntary proceeding on his part, as is the case under the bankrupt laws authorizing an involuntary bankruptcy. Looking, then, to these principles, it seems to me, that had Houlton applied for the benefit of the insolvent laws before the order given at Washington, his deed would have passed the property to his trustee, so as to deprive the defendant from proceeding against it by attachment or otherwise. The question then is, does the facts of the application of Houlton, *subsequently* to the giving the order at Washington, effect the case? Unless the statutes of Maryland have an extra-territorial operation upon its

citizens, then, notwithstanding the retrospective operations of the provisions of the act of 1834, Houlton had the right to dispose of his property as he did at Washington.

Personal property is always supposed to be at the place of the domicil of the debtor, and it is the law of the domicil which ought to decide the rights of creditors, and this rule will prevail unless a creditor by superior diligence has acquired by execution a paramount right over them, and his right thus acquired attaches to it the formalities of the law regulating the place of the execution ; and, “ the Judge who puts the creditor judicially in possession of property seized within his jurisdiction, is regarded as acting in the name of the debtor ; *so that it may be deemed affected by the same reasoning as if the debtor himself had given it in pledge to the creditors in the place where the property is seized.*” Conflict of Laws, sec : 325. Chancellor Kent in his commentaries states the rule thus : “ It may now be considered as a part of the settled jurisprudence of this country, that property, as against creditors, has locality, and the *lex loci rei sitae* prevails over the law of the domicil with regard to the rule of preferences in the case of insolvent estates.”

If these views be correct, then there was nothing illegal in the translation at Washington. I am speaking now, of course, independently of the question of *fraud* imputed to the defendant. That question remains to be considered.

Whether or no the jury will find the facts in the plaintiff's prayer is a matter with which the court has nothing to do ; the question for it to determine is, simply, if they do find those facts from the evidence, whether the defendant acquired title to the property so as to defeat the right of recovery of the plaintiff.

I deem it wholly useless to examine into the laws of

Virginia for the purpose of seeing what rights, under them, the defendant might have acquired. Certain it is he acquired none; the attachment was dissolved; never proceeded in to final judgment, and of course no rights were determined by it. Whatever rights he acquired were obtained at Washington.

What are the facts, supposing the jury to find the hypothesis of the plaintiff's prayer? They are, that the defendant agreed with Lewis to suspend for five days, if he would do the like, all legal proceedings against Houlton, and with Houlton himself that he would suspend all proceedings against him if he would proceed to Norfolk and the other places, and make an inventory of his goods and return and exhibit the state of his affairs to his creditors within a certain time. It must be recollected that at the time of the agreement Houlton owed him nothing, nor would he owe him anything until his notes became due. By this agreement the rights of Lewis were undoubtedly prejudiced if the subsequent action of the defendant is legal and proper, and Houlton put to needless and unprofitable labor and expense. Had the defendant instituted a suit against Houlton on the notes, (supposing for the sake of the argument they were due,) before the expiration of the five days, he must have been defeated, for under the decision in *Clopper v. Union Bank*, 7 Harr. & John: 104, the agreement with Lewis would have been a sufficient answer to his right of recovery; to say nothing of the agreement with Houlton himself for the latter was under no legal obligation to furnish an exhibit of his affairs, or to incur the expense necessarily attendant upon his doing so; his doing so was a consideration for the forbearance assented to by the defendant.

It is undoubtedly true as laid down in *Bacon's Abridgement*, tit. Release (A. 2. 683,) that a covenant not to sue for a limited time cannot be pleaded in an action of *cove-*

ment, but the covenantee must seek his redress in an action upon the covenant. But the case in 7 Harr. & John : 103, shows that the doctrine has no application to the action of *assumpsit*.

But, it is said, supposing all this be so, yet the right of Houlton to complain is gone on his execution of the order at Washington.

I am aware it is said in 2 Inst : 483, and 1 Blac : 131, that *duress* of goods would not avoid a man's contract ; but it must be presumed that Coke and Blackstone meant merely to lay down the general rule without recurring to excepted cases, for it has been *expressly* decided that duress of goods will, under certain circumstances, avoid a man's note or bond, and the doctrine is consonant with common sense, for every man's observation must inform him there are many cases under the circumstances of which the duress of property would have a more uncontrollable influence over the action of the debtor than any restraint on his personal liberty. The distinction recognized in the old books on this subject, is as absurd and repugnant to reason, as was the old rule which prevented a man from showing he was insane at the time of the execution by him of a deed, upon the nonsensical idea that no man should be allowed to stultify himself, a notion long since exploded. But the doctrine of a duress of goods is necessarily to be implied from what is said in Chase v. Devinal 7., Greenlief 140, that the legal maxim *volenti non fit injuria*, does not operate where there is a duress of goods, and in the case of Sasportas v. Jennings & Woodrop, 1. Bay, S. C. Rep. 470, it is expressly decided, after, as is stated in the report, the fullest consideration by the Supreme Court of South Carolina, that duress of goods will avoid a man's note ; and in the case of Collins v. Westbury 2. Bay 211,—a case strikingly analagous to the one now before the court,—it was said,

“ duress of goods will avoid a contract where an unjust and unreasonable advantage is taken of a man’s necessities by getting his goods into his possession, and there is no other *speedy* means of getting them back again, but by giving a note or bond, or where a man’s necessities may be so great as not to admit of the ordinary process of law to afford him relief.” That was a case of this kind :—the plaintiff had a claim against the defendants which they refused to pay as an unjust demand. While the latter were on their way to Georgia with their negroes, the plaintiff sued out an attachment against them, and seized the negroes for the demand. The defendants away from home, and their property seized upon, the plaintiff himself proposed a compromise of his old demand, which, as the only means of releasing their property from the attachment, the defendants consented to and gave their bond on which the suit was brought. *There was no compulsion, threats or force made use of on the occasion.* It was contended by the counsel for the plaintiff, as it has been by those of the defendant here, that he had done nothing more than the law of the State in which the attachment was sued out authorized, and that duress of chattels or goods alone will never be a good plea against a bond or other solemn contract entered into ; but the court held the doctrine which I have already stated.

Under these decisions, if the jury found the facts stated, I am of opinion no title passed to defendant under the order given him at Washington. There is evidence in the cause from which the jury may find these facts.— If they be found then, in conformity with the principles indicated in the earlier part of this opinion, the plaintiff, as trustee of the insolvent, was invested with the title to the property, and as a consequence of it, entitled to recover its value in this action.

Verdict for Plaintiff.

Counsel for Pl’ff.—Hon : Reverdy Johnson ; for Def’t.
Hon : John Nelson and C. F. Mayer, Esq.

MISHLER & HERTZLER v. THOMAS BAUMGARDNER.

*In the Court of Common Pleas of Lancaster County, No.
68, Nov. 1847. Motion for a new trial.*

1. Where the jury, in a *hard action*, disregard an instruction that the plaintiff is entitled to *nominal* damages, it is not sufficient ground for a new trial.

2. An attorney for the plaintiff, who has opened the cause and examined the witnesses on behalf of his client, is not a competent witness to impeach the credit of one of the defendant's witnesses by detailing a conversation had with the witness after the attorney's engagement in the cause.

3. When the testimony of the attorney becomes material to his client, the attorney should withdraw from the cause before he be tendered as a witness.

The opinion of the Court was delivered by LEWIS, President :

This is a motion for a new trial. We are not dissatisfied with the verdict of the jury, except in one particular in which it may be supposed they have disregarded the charge of the Court. This is, in general, good ground for a new trial ; but the case before us stands upon peculiar grounds. The action was trover, and the jury were, in substance, instructed that the defendant was liable to *nominal* damages, notwithstanding he innocently received the plff's. corn, by delivery of a mutual agent of both parties, and notwithstanding that such agent, before suit brought, corrected the error and compensated for the actual injury by delivering to the plaintiffs a corresponding quantity of the defendant's corn. This was believed to be the law ; but the instruction was given with some misgivings. It was putting the case upon a rule of great severity to the defendant ; and the jury, in disregarding it, if they did so, have only deprived plff's. of *nominal*

damages in what must be considered *a very hard action*. Under such circumstances it is against the usual course of the court to grant a new trial.—3 Bin. 520, 2 Salk. 653, 644, 645, 1 Burr. 54, 3 Binn. 525.

We are satisfied with the decisions made upon the admission and rejection of testimony. The only bill of exception which calls for particular remark, is that which relates to the rejection of the plff's. attorney, who was offered as a witness to impeach the credit of a witness for the deft., by stating a conversation held with the latter since the attorney became engaged in the cause. The case before us did not demand a response affirmatively or negatively to the *general question*, whether an attorney could, *in any case*, be a witness for his client. The question was whether he was competent to *impeach the credit of another witness in the manner proposed*, and the decision was that the attorney who is conducting the cause is not sufficiently *free from objection to his own credit* to be received to *impeach the credit* of another witness. The question necessarily resolved itself, at last, into one of *credibility*.

No case has been cited to show that the question has been distinctly made and decided in favor of such testimony; while two cases have been decided in England in which such testimony was held to be inadmissible. In the case of *Stones vs. Byron*, the verdict was set aside by Patteson J., because the attorney for the plff. had, after stating the case, examining the witnesses, and making a speech in reply, been examined as a witness to rebut the case set up by the defendant. In the case of *Dunn vs. Packwood*, the verdict was set aside by Earl, J., because the attorney, *after merely stating the case*, had been examined as a witness. These decisions, made at different periods of time, in two different cases, by two learned Judges of England, respectively, are entitled to consideration. 'The

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London Law Magazine, a work respected for the ability with which it is conducted, speaks of these decisions in terms of approbation, and informs us that in the argument of the first case a very apt illustration of the evil was drawn from the trial of Sir Thomas Moore, which Lord Campbell (*Lives of the Chancellors of England*, vol. 1, 590,) thus describes: "The jury, biassed as they were, seeing that if they credited all the evidence, there was not the shadow of a case against the prisoner, were about to acquit him. The Judges were in dismay—the Attorney General stood aghast, when Mr. Solicitor, *to the eternal disgrace of the Court who permitted such an outrage on decency*, left the bar and presented himself as a witness for the Crown. Being sworn he detailed the *confidential conversation* he had had with the prisoner in the Tower."—The editor of the *Law Magazine* adds: "the result we all know was a judicial murder of the deepest atrocity." The "*Western Law Journal*," in remarking upon these two English decisions, although inclined to think that they cannot be supported, approves of "the principles which they establish" and declares that the attorney "should be rejected, not for the protection of the opposite party, but for his own; not because his integrity may be exposed to temptation but because it will be exposed to suspicion," 5 W. L. J. 457. Judge Swift, in his work on evidence, declares that "nothing is more calculated to excite an unfavorable opinion than to see an attorney stand up to support a falling cause by supplying all deficiencies of proof from some supposed conversation with the opposite party, and according to the apt metaphor commonly applied to the subject, "*pinning the basket*." Swift Ev. 134.

The Pennsylvania Law Journal, in an able article on this subject, (6 P. L. J. 407,) suggests that 'when the testimony becomes material to the case, and when it is of such a

nature as to consist of independent and substantial proof, it becomes the duty of counsel, if he finds his presence in the witness box needful, *to withdraw from his position as an advocate*; and thus public justice, as well as professional character, will be relieved from the embarrassments from which they must suffer from the spectacle of counsel conducting a case as the representative of a party, down to a specific point, then slipping into the witness box to give a sworn statement of a fact in controversy, and then assuming the office of commenting on the evidence thus produced." The position taken by Lord Brougham in Queen Caroline's trial, although unsound in professional morality, is, and will continue to be, in *practice*, the ruling principle by which trials will generally be conducted. According to the views of that distinguished advocate, the attorney should "know nothing but his client—should see no other interest—feel no other duties, and obey no other calls than those which attend him in the capacity of an advocate." The writer in the *Law Journal* well remarks that "in the heat of the contest other considerations recede. The great object toiled for is the successful termination of the suit. When there is one link, and but one wanting in the chain of proof, it is not unnatural that a mind absorbed in the contemplation of its importance should become very unfit for the rendition of testimony by which that particular point is to be met."

In New York, the Court of Common Pleas have in two instances followed the recent decisions in England, while the Superior Court, in the late case of *Little vs. Keon*, June Term, 1848, (1 Code Reporter 4,) reversed a decision of a Justice for rejecting an attorney as a witness.—In relation to the last case it may be remarked that the relation of attorney and client does not perhaps properly exist, in a suit before a Justice of the Peace, and that the

decision was made under the new code of procedure, which, under certain circumstances, authorizes the compulsory examination of even the party himself, and which excludes no witness on the ground of interest, or even on conviction of felony. Mr. Justice Sanford, in the opinion of the court admits, however, that "gentlemen of the bar who habitually suffer themselves to be used as witnesses for their clients, soon become *marked both by their associates and the courts, and forfeit in character more than will be compensated to them by success in such clients' controversies.*" 1 Code Rep. 5. Shall the courts countenance and enforce a practice by which their own officers shall "forfeit their character and become marked," as infamous both "by their associates and the courts" themselves? The oath of the witness is inconsistent with the duties of the advocate. The latter is not permitted to disclose the confidential statements of his client, and yet he is sworn to tell the "*whole truth.*" It is true that judicial ingenuity might reconcile the two obligations with each other. But the course least liable to objection is to examine no one as a witness in chief who is identified with either party as counsel,—to place no one under oath to tell the whole truth whose existing obligations not only bind him to withhold portions of it, but to destroy, as far as may be legally in his power, the effect of so much of such testimony as makes against his client.

In the course of twenty-five years experience I have seldom known an attorney received as a witness in chief for his client, touching a disputed fact, without some loss of reputation, and without, to some extent, bringing reproach upon the profession to which he belonged, and upon the court of which he was an officer. Without intending the slightest reflection upon any one, I can say with truth, that I never knew the true interests of public or private justice promoted by the admission of such tes-

timony. The reasons are obvious. Existing prejudices and modes of thinking, whether just or not, point to the exclusion of such testimony as indispensable to the usefulness of all who are officially connected with the administration of justice. The reason which lies at the foundation of the rule of the civil law, may well be taken into consideration, in ascertaining the doctrine of the Common Law. Liability to "suspicion of partiality and falsehood" exists in each forum equally; and its consequences to the public, when applied to those who are constantly charged with official trusts, are too alarming to escape observation. Fully subscribing to the principles affirmed by the two decisions in England, we adhere to them so far as they are involved in the rejection of the plffs. attorney in the case before us, and believe that the rule of exclusion, except touching facts that the party himself may prove, is absolutely necessary to the cause of public justice, and to the preservation of that character for integrity, which the members of the legal profession now enjoy, and without which their usefulness would be destroyed. The rule for a new trial is discharged.

August 28, 1848.



New York Supreme Court, Special Term Cases.

Abridged from N. Y. Code Reporter.

Hubbell v. Livingston.—The signature of a defendant to the verification to a pleading without more is a sufficient "subscription" to a pleading. Per Watson, J.

Phillips v. Drake and others.—A bill of Revivor and Supplement is necessary to revive a suit, commenced be-

fore the 1st July, 1848, except in cases where the party sought to be made a defendant, will voluntarily come in as a party to the suit. Per Edmonds, J.

Rogers v. Mouncey and others.—A reference as to surplus moneys in a suit pending in the late court of Chancery, is not a reference under the Code, or under the Supplementary Act. Per Edmonds, J.

Wilson v. Onderdonk.—On motion to amend Notice of Appeal by making it a Notice of Rehearing: it was held that the court had no power to permit such amendment to be made. Per Barculo, J.

Spalding v. Spalding.—Where the statement of facts in a complaint is adapted to a suit, either in the second or sixth class, under the code, sec. 143, the judgment asked for determines to which it belongs.

Claims for injuries to personal property, and claims for its possession, are substantially different causes of action.

The affidavit claiming that the property taken is exempt from seizure under execution, &c., must conform to the 182d section of the Code, and "show" the property seized "is exempt from such seizure," by a statement of facts. Per Sill, J.

Follett v. Weed & Weed.—An application upon petition under 2 R. S. 199, for an order compelling a party to discover certain books and papers in his possession, &c., may be made in the same manner as before the Code took effect. The former practice is retained by secs. 389 and 390, and sec. 342 has not in any manner changed the practice—it applies only to papers, not to books. Per Sill, J.

Brown and others v. Babcock, Administrator, and others.—2 R. S. 424, secs. 5, 6, is undoubtedly retained by the Code, and should be considered in connexion with it.

The decisions of the courts under the Revised Statutes

may be considered safe guides, as to the terms upon which similar amendments are to be allowed by the courts under the code. **Per Mason, J.**

Watson v. Brigham, et. al.—In a partition suit, where any of the defendants do not answer within the time prescribed, it is unnecessary to enter an order for their default. Plaintiff is entitled to the relief asked for according to his notice. **Per Hand, J.**

Hartness and others v. Bennett.—A plaintiff has no right to treat as a nullity an answer regularly put in and duly verified. **Per Parker, J.**

Clapper v. Fitzpatrick and others.—The verification of a pleading may be properly omitted when the court can see that the matter contained in the pleading is such as might aid in forming a chain of testimony to convict the party of a criminal offence, if properly receivable in evidence. The criterion by which to determine whether a party may omit to verify his pleadings is to inquire, whether if called as a witness to testify to the matter contained in the pleading, he would be excused from answering. **Per Harris, J.**

Backus and Wife v. T. B. Stilwell and others.—A proceeding for the partition of lands, is clearly an action within the definition contained in the 2d section of the code. **Per Harris, J.**

Anonymous.—Held that the Code is constitutional. **Per Edmonds, J.**

GOULD.—The Commissioners exceeded the authority conferred upon them, by the statute appointing them.

EDMONDS, J.—That can be of no consequence. The only question is, whether the Legislature exceeded its authority.

GOULD.—It is alleged that it did so in abolishing the

distinction between Law and Equity, while the Constitution expressly recognized that distinction.

EDMONDS, J.—The Code abolishes the distinction only as to form ; only as to the mere practice. The great principles of Law and Equity, as they existed in our jurisprudence, at the adoption of our Constitution, are untouched. Besides, the power of altering the Common Law, in any respect, is expressly conferred upon the Legislature by the Constitution.—*Code Rep.*

Partridge v. McCarthy and others.—A motion to set aside a Demurrer as frivolous, will not be entertained.—The proper course is to place the cause on the Calendar. Per Strong, J.

Wyant v. Reeves and others.—In an action to foreclose a mortgage, the summons stated that judgment would be taken for a specific sum, but the complaint prayed only a sale and payment of the proceeds. On motion for judgment, it was held that the motion must be denied, without prejudice to a motion to amend the summons. Per Strong, J.

Fowler v. Houston.—Case in which the 10 per cent. will be allowed under sec. 263 of the Code.

This was a complaint filed against the defendant as the endorser of a promissory note, to which the defendant had put in an answer, denying that he had received any consideration for his endorsement. No affidavit of merits being filed, an inquest was taken at the Orange Circuit, in October, 1848. At the time for rendering the verdict,

Fullerton for plff., moved for an allowance of the ten per cent. under sec. 263 of the Code, on the ground that it was evident that the defendant had no defence, and had put in an answer solely for purposes of delay.

Edmonds, J., said that it was evident that the whole purpose of the defendant had been not to obtain a deter-

mination of a disputed question, but to obtain delay. His purpose was answered, and when the cause was called he allowed judgment to be taken against him, without any resistance on his part. This was in fact using the forms of law for mischievous purposes, and converting that which was designed as a means of obtaining substantial justice into an engine of oppression. It was in fact a fraud upon the law, and surely is a case in which, if ever, the discretion of the Court under sec. 263 of the Code ought to be exercised.

If there was a fair matter of dispute between the parties, a contest of doubt carried on in good faith, in order to obtain a decision of the Court upon a difficult matter, there would be much less justice in inflicting upon the losing party the punishment of a per centage on the amount in controversy, than where a debt is honestly due and a false defence put in, merely for the purpose of staving off the day of payment.

There is another consideration in favor of allowing the per centage in such cases. The amount of costs allowed by the Code is so small that where the amount claimed is large, great temptation is held out to the debtor to put in an answer to obtain time. The penalty thereby attached to such conduct, would, if it was limited merely to such costs, be altogether too trifling to deter any one from putting in false answers. This, in my district, New York, would soon swell to be an alarming evil, and encumber our calendars beyond the possibility of reduction. Thus the evil would be allowed to augment itself: and it can, under the law as it now exists, be guarded against only by exercising the power conferred by the section in question.

I shall therefore be disposed in all such cases to award the per centage, believing that such will be the most beneficial application which can be made of the discretionary

power conferred on the Court by this provision of the Code. Motion granted.—*Code Rep.*

Stanley v. Anderson.—Assessment of unliquidated damages—In an action not arising on contract, where judgment is taken on failure to answer, and the plaintiff asks for the assessment of damages by a jury; the Court will order the Sheriff of the County named in the complaint to summon a jury of twelve men, as formerly practised in a court of Inquiry, for the purpose of assessing the plaintiff's damages. Per Hand, J.

FROM COMSTOCK'S REPORTS OF THE COURT OF APPEALS
OF NEW YORK.

Bouchaud v. Dias, 201.—An assignment of property by an insolvent debtor, in trust for one creditor, is not within the act of Congress, 1799, cap. 128, sec. 65. Costs on an appeal are in the discretion of the court, and a decree should be reversed without costs.

Coggill v. American Exchange Bank, 113.—A. drew a bill upon plaintiff, payable to the order of B., and having forged B's. name as endorser, had it discounted by C. C. endorsed the bill, and transmitted it to defendant for collection. Plaintiff accepted the bill, and paid the amount to defendant, and on discovering the forgery, sued to recover back the money so paid. Held, that the action could not be maintained.

Danks v. Quackenbush, 129.—The act passed 11th April 1842, to extend the exemption of personal property from sale under execution is unconstitutional, and void as to debts contracted before its passage.

Henry v. Bank of Salina, 83.—A party called upon to testify under the usury act of 1837, cannot be compelled to disclose facts showing that the note, the subject of the suit, was discounted by him in violation of 1 R. S. 595,

sec. 28. A witness may refuse to disclose any one of a series of facts, which, together, would subject him to a penalty.

Martin v. Wilson, 240.—After judgment has been affirmed, and a remittitur filed in the court below, the Court of Appeals loses all jurisdiction of a cause.

Pierce v. Delamater, 17.—Under the Constitution of N. Y. it is the duty of a Judge of the Court of Appeals to take part in the determination of causes brought up from the Court of which he was a member, and in the decision of which he took a part.

Stief v. Hart, 20.—A Sheriff holding an execution against a pledger, may take property pledged out of the possession of the pledgee, and sell the right of the pledger therein, but after the sale the pledgee is entitled to possession until the purchaser redeems.

PHILADELPHIA QUARTER SESSIONS, OCTOBER, 1848.

Commonwealth v. Barbara Ann Corson.

1. An indictment for adultery against a married woman must set forth upon the record the name of her husband.
2. It seems that every thing material in the description of the substance, nature, or manner of the crime must be set forth.

PARSONS, J. delivered the opinion of the Court, from which we make the following extract :

The question submitted for our decision arises on a motion in arrest of judgment.

The defendant was found guilty of adultery. The indictment charges that the said Barbara did commit the crime of adultery with one William D. Handy, she, the said Barbara, being then and there a married woman, and having a lawful husband then living and in full life. The

reason filed in arrest of the judgment is, that the indictment is defective, in not setting forth the name of the alleged husband.

Is it requisite in an indictment for adultery against a married woman to set forth upon the record the name of her husband?

This question is best answered by reference to general principles in relation to indictments. It was held in *Rex vs. Horn, Cowp. 683*, as to the *matter* to be charged in the bill, whatever circumstances are necessary to constitute the crime imputed, must be set out. And it is equally clear that the omission of any fact or circumstance necessary to constitute the offence will be fatal. *Whart. C. L. 78*. It was necessary to state upon the record, and prove that the defendant was a married woman. It was equally necessary to prove to whom she was married, and that the individual was some one else than the person with whom it is alleged she had criminal connection. It was necessary, *to constitute the offence*, that she was married to some person, and according to the rule above cited, it would seem to be requisite that the name of the person should be set forth in the indictment. It is to be borne in mind that in an indictment, nothing material shall be taken by intendment or implication—*2 Haw. P. C. 324*. If it was necessary to prove that the defendant was married to Jeremiah Corson (as it was proved on the trial,) it seems to be equally clear that this fact, in analogy to all other cases, should have been stated on the record.

Now, if we take the reading of the indictment, the defendant might be a married woman, and have a husband in full life, yet still not be guilty of adultery. For aught the record shows, she may have been the wife of Handy; but it is said the name by which she is charged shows to the contrary. But this is not certain; for she may have been married to him clandestinely, and not have as-

sumed his name. I know it is argued that all this could be proved by her. But that is not exactly the position in which it seems the Commonwealth are placed; the law requires that the indictment should state the facts of the crime with as much certainty as the nature of the case will admit. (1 Chitty, 140.) Therefore the pleader could have averred that she was the wife of J. Corson, or that she had this criminal connection with Handy, not being his wife, but being the wife of another, and even then, I think, the name of the husband had better have been mentioned. For it is equally clear that an indictment ought to be certain to every intent, and without any intendment to the contrary. (1 Chitty, 141.)

And why is this rule thus binding? Because our best writers on criminal law, and most eminent Judges, tell us that the charge must be laid positively, and that the want of a direct allegation of "anything material in the description of the substance, nature, or manner of the crime," cannot be supplied by any intendment or implication whatsoever. (2 Hawk, P. C. 323.) If then we test this indictment by this rule, much that is material in the description, nature, and manner of the crime, to make the defendant amenable to the criminal law, is wanting.

It is material to show that she was a married woman—to show that she was married to some person other than Handy; why not then aver it? It was requisite to prove to whom she was married. If so, why not aver it upon the record? It seems to me the defendant had a right to demand all these allegations before she should be called upon to answer this bill. For there is no rule of law better settled than that the offence must be stated with such precision that the defendant's conviction or acquittal may ensue to his subsequent protection, should he be again questioned on the same grounds; the offence, therefore, should be defined by such circumstances as will, in such

case, enable him to plead a previous conviction or acquittal in bar of the same offence. (Staunf. 181—Wharton, C. L., 82.) How could this defendant avail herself of this rule from any thing which is stated of the circumstances of this offence upon the record?

From analogy to all other cases in criminal pleading, it seems to me the record ought to aver to whom the accused was married when one is charged with adultery.—To charge one with having obtained money under false pretences, without stating what were the particular pretences, is insufficient. (1 Chitty, 141.) So in an indictment for burglary, it is requisite that it should be stated on the record that the offence was committed in the night time, and generally to allege a particular hour. And why is this precision required? Because, unless the breaking and entering was in the night time, it would not be burglary. If property was taken by such entry in the day time, it would only be larceny. Now you cannot supply such defect in the bill for this offence by proof that the deed was perpetrated in the night time. And why? Because the averment that it was committed in the night time is material, in the description of the nature or manner of the crime.

Now it seems to me that when it was material to show to whom the defendant was married, it was equally requisite to state this description of the offence upon the record, and without such averment, or at least words equivalent, the record is insufficient.

But it has been contended that this indictment has been drawn in accordance with Davis' Precedents, and therefore there is authority for this form of pleading. I fear that the precedent will be found to be a bad one. Mr. Davis was for many years Solicitor General of Massachusetts, but the Supreme Court of that State, when determining upon a case of this description, when the prose-

cution had followed the same precedent, pronounced it bad.—*Com. vs. Moore*, 6 Metcf. 243. That case rules the present, nor can there be a distinction drawn between them. But we are told such a decision is not binding upon this court, like a case determined by our own Supreme Court. If the opinion of the court of that State is in strict accordance with the principles of the common law, as applicable to this country, then we are bound to regard it as an authority.

In my opinion, the reasoning of *Ch. J. Shaw*, is unanswerable ; a conclusion, based upon the firmest principles of pleading, as known and recognized by the common law of England and this country ; and until the Supreme Court of this State should lay down a different rule, it is one which I think we ought to adopt, as being a safe guide in the application of the rules of pleading in criminal cases. Perhaps no State in the Union can claim more eminent Judges than those who compose the Supreme Court in that State. I therefore have no hesitation in adopting their ruling as the law in this case.*

On principles and authority I think the present record is defective, for the reasons already given, and therefore the judgment must be arrested."

COMMONWEALTH *v.* MCGOWEN, ET. AL.

In the Quarter Sessions of Philadelphia.

The defendants were convicted of conspiracy, and moved for a new trial.

The defendants were charged with a conspiracy to cir-

*See Wharton's *Precedents of Indictments*, 584, which Judge P. cites with approbation, and Lewis' *Criminal Law*, pp. 31 and 677, note.—*Ed. Am. L. J.*

culate certain Bank notes of the Bank of Chester County, knowing the same to have been stolen. The witness on whose testimony the Commonwealth essentially depended to establish the criminal combination charged, was a certain Robert Larkey, an accomplice in the crime. After a very full examination in chief, in which Larkey, if worthy of credit, brought home the crime to all the defendants, he was asked on cross-examination, whether he had not, in a conversation with Andrew Morrisson, declared to the latter that he did not know one of the defendants, Edward McGowan. In his reply to this interrogatory he denied ever having made this statement to Mr. Morrisson. The Commonwealth having closed her case, the prisoner's counsel called Morrisson, and proposed proving by him that Larkey had made to him the statement which in his examination in chief Larkey had denied to have been made by him. This testimony was objected to by the Commonwealth, on the ground that Morrisson, being a deputy keeper of the prison, in whose custody Larkey then was, was incompetent to testify as to any communication made to him by a prisoner under his charge. The Judge who presided at the trial sustained the objection and refused to permit Morrisson's testimony to go to the jury.

KING, President, delivered the opinion of the Court, in which it was held that Morrisson's testimony was material to the defence, and that its rejection invalidated the whole verdict. It was stated that "the case of the Com'th. v. Mosler, was not brought to the consideration of the presiding Judge who ruled the point at the trial, on the authority of previous Nisi Prius decisions, which he agrees cannot be sustained since the judgment of the Supreme Court in Mosler's case." New trial awarded.

Supreme Court of Pennsylvania.

ABSTRACTS OF DECISIONS.—PHILADELPHIA, DEC. 1848.

Schnebly v. Brooks.—Where the action and plea are joint, though there be several appearances by attorneys, notice to one to produce a paper is notice to both. Per Rogers, J. Dec. 18.

Road in Lehman Township.—Proceedings set aside because the termini are not shown by either draft or report. Per Cur. Dec. 18.

Com'th. ex. rel. Feehan v. the Judges of the C. P.—Under the act of 11th April, 1848, relating to insolvents, the applicant who is in prison under a sentence to pay a fine is not entitled to his discharge until he has been in prison for the term mentioned in prior laws, viz: three months. The evil to be remedied was a detention pending the petition after the applicant had been confined three months. Per Bell, J. Dec. 20.

Supreme Court of Tennessee—at Knoxville.

SEPTEMBER TERM, 1848.

Reported for the Knoxville Tribune by O. P. Temple and R. H. Armstrong, Esqrs.

McDERMOTT v. THE BANK OF TENNESSEE.

1. Where a deed of trust is executed as collateral security for the payment of two promissory notes, both made by the grantor in the deed, but with different endorsers, the proceeds of the security cannot be applied to the payment in full of one of the notes, but must be applied *pro rata* to both notes.

The Branch of the Bank of Tennessee at Rogersville, was endorsee of two promissory notes discounted at said branch, of which P. B. Anderson was maker; the one for
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\$5,500, endorsed by D. D. Anderson and G. G. Murrel, and the other for \$2,000, endorsed by A. Anderson and complainant, all of the endorsers being mere accommodation endorsers. As collateral security to the bank for both notes, a deed of trust was executed by the maker, by which a tract of land was conveyed to a trustee for the sole benefit of the bank. In said deed it is stipulated that upon the failure of the maker to meet the calls, and make payment of said notes, the trustee shall make sale of said tract of land, and the proceeds thereof "shall be applied to the payment of whatever amount shall be found due to said branch bank of Tennessee from P. B. Anderson on account of his said notes."

Anderson having failed to comply with the requirements of said deed of trust, said two notes were regularly protested for non-payment at maturity. The tract of land conveyed in trust having been sold by the trustee, was purchased by the bank at \$500, which was afterwards increased to \$5,000. The nett sum realized by the bank was \$4,961, the whole of which sum was applied by the bank towards the satisfaction of the note for \$5,500, leaving the other note upon which complainant was endorser, wholly unsatisfied. The maker being insolvent, suit was brought upon the latter note against the complainant alone, and in 1843 judgment was recovered thereon against him for \$2087 66½ exclusive of costs.

The complainant filed his bill in Chancery to have the fund realized by the bank from the proceeds of the sale of said land applied equally towards the satisfaction of both notes in proportion to their respective amounts. The Chancellor so decreed, and the bank appealed.

Van Dyke and *Lyon* for complainant; *Hynds* for deft.

McKinney, J., held that the Chancellor did not err. In the absence of any stipulation, the fund standing equally pledged for the satisfaction of both notes, the complain-

ant, upon general principles, is clearly entitled to have said fund applied *pro rata* to both of the notes. This right is founded, not in contract, but in the result of general equity, on the ground of equality of burden and benefit. Decree affirmed.

EVIDENCE OF CHARACTER.

A correspondent has forwarded a decision of a highly respectable Court in Pennsylvania, in which it was held, in an indictment for rape, that the defendant could not be permitted to prove "that the prosecutrix before and at the time she swears the offence to have been committed, was a common prostitute, to rebut the presumption of the offence being a rape." From our knowledge of the ability of the Judge who presides in the district from which this case is transmitted, we are inclined to think that his opinion must have been misunderstood, or that there must have existed some circumstances in the case not stated in the report. For that reason we suspend the publication of the decision, until further advised. It is conceded that as a general rule, the testimony of a witness cannot be impeached by showing that she is a common prostitute. 4 Watts. 380, 18 Wend. 150. But in an indictment for *Rape* such evidence becomes material upon a principle peculiar to the nature of the offence. The gist of the charge is that the carnal knowledge was had "forcibly and against the will" of the prosecutrix. If, from her whole character and conduct, a jury might fairly infer a general license to all mankind, it would require stronger evidence in such a case to convict. It would be necessary to satisfy the jury that, in the particular case on trial, the general license had been withdrawn, and this they would not readily believe without evidence tending to show a reformation, or some other reason for departing

from the usual course. In *Rex v. Clarke*, 2 Star. Nisi Prius. cases 217, tried in 1817, Holroyd, J. stated that in an indictment for rape, evidence that the woman had a bad character previous to the supposed commission of the offence is admissible. This, he continues, "is the law upon an indictment for a rape, and I am of opinion that the same principles apply to the case of an indictment for assault and battery with intent to commit a rape." This statement of the law in case of rape was made on the authority of a decision of a majority of the Judges in England, made in 1812, on a point reserved on the trial of Hodgson's case. 2 St. Ev. 368, 3 ib. 1269. Evidence in regard to the *conduct* of the prosecutrix, showing her to be a common prostitute, was also admitted in *Rex. v. Baker* 3 C. & P. 586, 14 Eng. C. L. R. 467, and in *Rex. v. Martin* and *Rex. v. Aspinwall*, 6 C. & P. 562, 25 Eng. C. L. R. 544, upon the same principle of raising a presumption of consent, evidence was received of a previous voluntary connexion with the prisoner himself. And although in Dec. 1837, it was held in New York that as a general rule, evidence that the witness bore the character of a common prostitute could not be received to impeach her testimony, *Bakeman v. Rose*, 18 Wend. 150, yet in the very next month the case of an indictment for rape was held to be an exception to the rule. *People v. Abbot*, 19 Wend. 197. Cowen, J., in delivering the opinion of the court declares that "the books are certainly *strong and uncontradicted* that, on trying this offence, the character of the prosecutrix as a common strumpet may be proved, though it is not clearly held to be receivable in other prosecutions as an impeachment of veracity. "Will you not," he continues, "more readily infer assent in the practised Messalina in loose attire, than in the reserved and virtuous Lucretia? It requires stronger evidence to be added to the oath of the prosecutrix in one case than in the other."

In the *Com. v. Murphy*, 14 Mass. 387, evidence of the bad character of the prosecutrix was admitted without objection. See Metcalf's note in 2 Star. Ev. 368; and it was only when the same evidence was offered to impeach the character of one of the *defendant's* witnesses, that the question was raised and a decision pronounced, as reported in 14 Mass. 387, which has not been generally approved of as satisfactory. But so far as regards the prosecutrix herself, it was the doctrine of Hale, that her "good fame" was an important circumstance in trials for this offence. 1 Hale P. C. 448. Roscoe is of the same opinion, Roscoe Crim. Ev. 71, 710. The same doctrine is to be found in Lewis' Crim. Law 561, and in Wharton's Crim. Law 296, and in Greenleaf's Ev. sec. 54. And from these authorities, the evidence appears to be equally admissible whether the indictment be for rape or for an assault with intent to commit it. It is true that the bad fame of the prosecutrix is no excuse where the offence has been actually perpetrated, but it is powerful evidence to show that no such offence could have been committed. In charges of this kind, so easily made and so difficult to be disproved, there is no reason for throwing any additional embarrassments around the defence.

THE WILMOT PROVISIO.

That clause of the Ordinance of 1787 which prohibits Slavery in the Territories, has acquired the name of the Wilmot Proviso. Without intending to express any opinion of its Constitutionality, or to intimate how far the Legislative power is bound by Judicial decisions, in settling the construction of the Constitution, the following references to some of the cases in which the validity of the Ordinance of 1787 was drawn in question in the State Courts, are given as matters of information :

Indiana.—In the case of the negro Polly, who claimed that by the

Ordinance of 1787 and the Constitution of Indiana adopted in 1816. she was entitled to freedom; the Supreme Court of Indiana held that she was free. *Indiana v. Laselle* 1 Blackf. 62.

Illinois.—The Ordinance of 1787 is binding upon the people of the State of Illinois, unless abrogated by common consent. By common consent is meant the United States and the people of the State of Illinois. *Phoebe v. Jay*, Bre. 110.

The descendants of the slaves of the old French settlers, born since the adoption of the Ordinance of 1787, and before or since the Constitution of Illinois was adopted, cannot be held in slavery in that State. *Pete Jarrot v. Julia Jarrot*, 2 Gillman 1.

It is by virtue of the provision in the Constitution of Illinois, and that alone, that this Court decided in the case of *Nance v. Howard*, Bre. 187, *Phoebe v. Jay* ib. 207, *Boon* †. *Juliet*, 1 Scam. 258, *Choisser v. Hargrave* ib. 318, and *Sarah v. Bolders*, 4 do. 341, that colored persons could be held to a specific performance of their contracts and indentures under the act of Sept. 17, 1807, of the Indiana Territory; and that without that Constitutional provision they would be entitled to their freedom, for the reason that the provisions of the act were void as being repugnant to the Ordinance of 1787. Per Young J. 2 Gillman 21.

Missouri.—Held that a negro woman who had been taken into the Illinois Territory since the Ordinance of 1787, by her owners, who resided there four years, thereby became free, and upon being taken afterwards to the State of Missouri, was not remitted again to a state of slavery, and that Congress under the confederation had the power to pass the Ordinance. *Winnay v. Whiteside*, 1 Missouri 472.

The mother of John Merry had been held as a slave in Virginia, and taken into Illinois before the Ordinance of 1787, and held in slavery before and after its passage, and the said John Merry was born there after the Ordinance was enacted. It was held that he was free. *John Merry v. Tiffin & Menard*, 1 Missouri 725.

The mother of Aspasia, a colored woman, was born a slave at Kaskaskia, in Illinois, previous to 1787, and before that country was conquered by Virginia. Aspasia was born in Illinois subsequent to the passage of the Ordinance of 1787, and was afterwards sent as a slave to Missouri, in which State she claimed to be free under that Ordinance. The Supreme Court of Missouri decided that she was free; and the Supreme Court of the United States refused to re-examine the decision, on the ground that the decision of the State Court had been in affirmance of the right claimed under the Ordinance and not adverse to it, and that therefore the case did not fall under the provisions of the 25th section of the act of 1789. *Menard v. Aspasia*. 5 Peters 505.

Louisiana.—The deed of cession by Virginia did not deprive Congress of the power to pass the 6th article of the Ordinance of 1787; this Ordinance fixed forever the character of the population over which it extended; a negro born in the North West Territory since the Ordinance is free. *Merry v. Chexnaider*, 20 Martin 699.

Mississippi.—The treaty of cession by Virginia to the United States, which guarantees to the inhabitants of the N. W. Territory, their titles, rights and liberties, does not render void that article of the Ordinance of Congress of 1787, which prohibits slavery in that Territory. Any State may by its Constitution prohibit slavery within its limits, and so may the Legislature of any State when not restrained by the Constitution. Slaves within the limits of the North-western Territory became freemen, by virtue of the Ordinance of 1787, and can assert their claims to freedom in the Courts of this State. *Harry and Others v. Decker and Hopkins*, Walk. 36.



New Publications.

REPORTS OF CASES argued and determined in the Supreme Court of the State of Illinois. By Charles Gilman, Counsellor at Law. Vols. 1, 2, 3 and 4. Quincy: Published by Newton Flagg. Galena: J. Brookes. Chicago: A. H. & C. Burley. Springfield: Johnson & Bradford. 1846, 1847, and 1848.

The Constitution of Illinois was adopted on the 26th Aug., 1818. Mr. Breese, was, we believe, the first reporter; Mr. Scammon followed, and on the 30th Jan. 1845, Charles Gilman, a Counsellor at Law of eminence, residing at Quincy, accepted the appointment. The 1st volume of Gilman's reports consists of decisions made at December Term, 1844, immediately before his appointment. In collecting the materials for these cases he labored, of course, under many disadvantages. The 2d volume contains the decisions of 1845; the 3rd those of 1846; and the 4th those of December Term, 1847. This latter volume completes the publication of the decisions of the Supreme Court of Illinois under its late organization. The term of office of the late incumbents expired on the first Monday of December, 1848, by virtue of the provisions of the new constitution, and on that day the term of the three Supreme Judges elected by the people commenced. Chief Justice Wilson received his first appointment on the 7th August, 1819: Mr. Justice Brown was appointed on the 9th October, 1818; and the other seven Judges at more recent periods.

The volumes before us are handsomely printed.—on excellent paper,

and are well bound. They are large octavo volumes containing from 700 to 800 pages each. The reporter has given an index carefully prepared and a table of the names of cases. The points decided appear to be stated at the commencement of the case with precision and judgment, and where the questions disposed of are important, a full statement of the argument of counsel is given with the references to authorities relied upon. It gives us pleasure to notice also that where a proper understanding of the matter in controversy requires it, an elegant draft of the *locus in quo* is given. The reporter and the publisher deserve great credit for the manner in which these decisions have been presented to the profession.

But the decisions themselves are, for the most part, as those in all new countries are, upon new and interesting questions. Although we are sorry to perceive, from an observation of Mr. Justice Caton, 3 Gilman 343, that the Judges have not access to the Pennsylvania Reports, we are gratified to discover that they are able to exercise their judicial functions creditably without them. Indeed, in one case, we think they might have been embarrassed by the light to be derived from Pennsylvania. In settling the principle that where the title of property purchased by the plaintiff under execution fails, and the property is recovered back from the creditor, it is no satisfaction of his debt, (*Warner v. Helm*, 1 Gilman 234,) the Pennsylvania doctrine, as maintained in *Freeman v. Caldwell*, (10 W. 9,) might have prevented them from arriving at a result certainly sanctioned by the purest equity. It was better that on this question they relied upon the light to be found in 5 Cowen 280, *ib.* 38, 1 Dana 436, 3 Littell 427, 3 Blackf. 293 and 2 N. H. Rep. 79.

But their strong sense of sound legal principle was in another question nearly overpowered by a deference to the authority of the late English decisions in *Rex. v. Ellis*, 5 B. & C. 395, and *Rex. v. Bourne* 7 Ad. & Ellis 58; and we fear, if the weight of Massachusetts (*Shepherd v. Com.* 2 Met. 419) had been thrown into the scale, they might have permitted a murderer, legally convicted, upon a valid indictment, to escape, because the court below had erroneously pronounced sentence of death upon Sunday. As it was, in order to avoid the force of an adverse transatlantic current, they were driven into moorings which we should not regard as altogether safe. They held that a sentence on Sunday was no sentence at all—that the case stood precisely as if the court, after receiving the verdict of guilty, had refused to proceed any further in the cause; and therefore they awarded a "*procedendo* to the Circuit Court to render the judgment of the law upon the verdict of the jury." We think that a case referred to by Mr. Justice Rogers in 1 Wharton 281, and the opinion of the court in *Daniels v. Com'th.* 7 Barr 375, together with some

remarks in the *American Law Journal*, vol. 1 p. 10, might be of service if a similar question should arise. The decision of the Supreme Court of Illinois, on the question of receiving a verdict on Sunday, accords with the doctrine in *Lewis' Crim. Law* 421.

The honest independence, and the fearless integrity with which these Judges maintain the inviolability of contracts is worthy of the highest commendation. After the Supreme Court of the United States had decided that the act of 1841, (an appraisement law) was unconstitutional, a similar question was presented, arising under an act passed on the 6th January, 1843, containing provisions substantially similar to the first. But the last mentioned act was promptly pronounced unconstitutional. 2 Gil. 384. And in *Bruce v. Schuyler et al.* 4 Gilman 275, Ch. J. Wilson declares that "any act which changes the expressed intention of the parties to a contract, or such as results from their stipulations, is held to impair its validity, and it is immaterial as to the extent, or the manner of the change, whether it be ever so minute, or relates to its construction, its evidence, or the time or manner of its performance, the conclusion is the same. Every conceivable change of a contract impairs its validity, and renders it null and void."

In *Jarrot v. Jarrot* 2 Gilman 1, there is an interesting decision upon the constitutionality of the Ordinance of 1787, and its operation in discharging from bondage the descendants of the old French slaves born since its adoption. In this case many authorities in which the same question has been investigated are cited. As the politicians have possession of the question at present, the case will be interesting to the public in general.

We commend these reports to the profession as well worthy a place in their libraries.

PRECEDENTS OF INDICTMENTS AND PLEAS, adapted to the use both of the Courts of the United States and those of all the several States; together with notes on criminal pleading and practice, embracing the English and American authorities generally. By Francis Wharton, author of a treatise on *American Criminal Law*. Philadelphia: James Kay, Jr. & Brother, 183½ Market Street, Law Book-sellers and publishers. 1849.

This work is an octavo of about 600 pages, handsomely printed on good paper. "In the first book is given a general form of indictment with caption, commencement, and conclusion, adapted to the federal courts and to those of the several States; and to each averment in the text is attached a note incorporating the doctrine bearing upon it. The indictments relating to each individual offence are in like manner preceded by a general preliminary form, to which are appended notes, divided on the same

principle of analysis." The labors of the intelligent author appear to have been performed with care and ability. Under the head of *Accessories*, at pp. 32-3-4, we have a long note embracing the English and American authorities. Under *Homicide*, at pp. 42-3-4-5-6-7, we have similar notes of great length and value. We may say the same of the notes under the heads of *Forgery*, pp. 129 to 136, *Arson*, pp. 183 to 185, *Larceny*, pp. 190 to 192, *False Pretences*, pp. 239 to 243, *Perjury*, pp. 277 to 282, and *Libel*, pp. 545 to 548. But the notes under the head of *Conspiracy*, pp. 330 to 353, are particularly deserving of attention. They display great research, industry and judgment, and they derive increased interest from the remarks of the author upon the recent decision of the Supreme Court of Pennsylvania, in the *Com v. Hartman, et al.* (Lew- is C. L. 222.) The manner in which he examines the principles of that decision, in connexion with other English and American decisions bearing on the same point, is worthy of commendation. Under the head *Bribery* the celebrated indictment against M'Cook, for attempting to bribe a member of the Legislature is given, together with the able opinion of Judge Eldred, holding that the offence is indictable at common law.

There is an interesting note under the head *Abortion*, p. 109, in which the author does himself credit in drawing freely from a kindred science the light necessary to illuminate his path. It seems that Mr. Justice Sergeant, in delivering the opinion in *Com. v. Demain*, (6 Pa. Law Jour. 29.) has expressed himself so briefly as to lead to a difference of opinion between Mr. Wharton in his work, p. 109. and Judge Lewis in his *Criminal Law*, p. 13, in regard to the doctrine intended to be maintained by the Supreme Court. We are happy to perceive that these writers do not, however, differ in their views of the common law on the question. Mr. Wharton judiciously and ably exposes the absurdity of the notion that the motion of the *fœtus*, called *quickening*, is the commencement of vitality. And to show that the two writers are in perfect harmony on this question, we give the following extract from Lewis' *Crim. Law*, p. 15:

"Long before quickening takes place, *motion*, the pulsation of the heart, and other signs of vitality, have been distinctly perceived, and, according to approved authority, the *fœtus* enjoys life long before the sensation of quickening is felt by the mother. Indeed no other doctrine appears to be consonant with reason or physiology but that which admits the embryo to possess vitality from the very moment of conception." It would seem to follow that those laws which exempt from punishment the crime of producing abortion at an early period of gestation, are immoral and unjust. They tempt to the perpetration of the same crime at one time which at another they punish with severe penalties. It is in morals a high offence to extinguish the first spark of life. And, according to Per-

* 1 Beck Med. Jur. 223

cival, these regular and successive stages of existence, are the ordinances of God, subject alone to his Divine Will, and appointed by sovereign wisdom and goodness as the exclusive means of preserving the race, and multiplying the enjoyments of mankind.† It would seem, therefore, that the English common law is in accordance with reason as well as with scripture‡ in recognizing and protecting from destruction these early stages of existence;§ while it very properly reserves its highest penalties for the destruction of the infant after it is completely born, and after it has established a separate existence by means of an independent circulation,|| and inhaling the “breath of life,” whereby, like its great progenitor, it became a “living soul.”¶

We regret that Mr. Wharton has adopted a classification of offences, (although resting upon authority,) which is not clearly sustained, as we think, upon principle, and certainly not convenient in a work on practice. We never appreciated, as perhaps we ought, an arrangement of offences which designates forgery as an offence against *property*, and perjury as an offence against *society*—robbery on land as an offence against *property*, and robbery on the high seas as an offence against *society*,—arson and burglary as offences against *property*, and the *attempts* to commit those crimes as offences against *society*. But there is an excellent index which compensates for the inconveniences of this classification; and the book of Mr. Wharton is, upon the whole, a highly valuable contribution. Its copious collection of American precedents give it a value in criminal practice which we think no other work possesses.

OUTLINES OF A COURSE OF LECTURES ON MEDICAL JURISPRUDENCE.

By Thomas Stewart Trail, Regius Professor of Medical Jurisprudence in the University of Edinburgh. First American. from the second Edinburgh edition, revised with numerous notes.

This is a small but valuable work, for sale by Judd & Murray, Lancaster, Pa. It contains 234 pages and treats of questions effecting the civil or social rights of individuals—of injuries to property—and person—and of Medical Police. In giving the history of Medical Jurisprudence, the author pays a just tribute to Dr. Beck, in declaring the last edition of his work as “the best on the general subject, which has appeared in the English language.” We do not, of course, endorse all the doctrines of Professor Trail. We are not sure that his opinion on protracted gesta-

† Percival's Works, vol. ii. p. 430-31.

‡ Exodus, c. xxi; 3 P. and Fonb. Med. Jur. 84.

§ Rex. v. Poulton, 5 C. & P. 329.

|| Rex. v. Enoch, ib. 539: Rex. v. Wright, 9 C. & P. 754.

¶ Genesis, c. ii.

tion would square with the decision in *Com. v. Hoover*, reported in *Lewis' Crim. Law*, p. 48. And his views of the English common law in regard to Abortion, before quickening, do not appear to be sanctioned by Mr. Wharton in his *Precedents*, p. 109. He traces the origin of Medical Jurisprudence up to the remote times of Moses. The science has, however, greatly advanced since that period, and the rule of evidence adopted by that great Law-giver and Judge, in case of alleged impurity (*Deut.* 22-25) would now be regarded as unsuited to the present physiological condition of the human race. Indeed the test regarded by Moses as conclusive, seems to have been early exploded by the larger experience of Solomon, who regarded the offence which it was relied upon to elucidate with absolute certainty, as one which it was as difficult to discover as the track "of the eagle in the air, of a serpent upon a rock, or of a ship in the midst of the sea." *Prov.* 30, 19.

Professor Trail's work contains within a small compass a large amount of valuable information, so arranged and condensed as to be readily accessible.

APPENDIX TO CASES IN THE CIRCUIT COURT OF THE UNITED STATES, for the Third Circuit: containing the Pea Patch or Fort Delaware Case. Reported by John William Wallace. Philadelphia: Walker, 24 Arch Street. 1849.

This is a neat and well prepared report of the celebrated Pea Patch litigation, a case which has been in the hands of the profession for many years. It is a part of the first volume of J. W. Wallace's Reports. Mr. Wallace is the regular reporter of the Circuit Court of the United States for this District, and has, it is understood, a volume nearly ready for the press. This is an Appendix to that volume, and is a pamphlet of 161 pages.

A short sketch of the controversy will not be uninteresting: "about the year 1763-4, there appeared at low tide in the Delaware river, about five miles below New Castle, a small muddy exposure of the soil, "about the size," as was testified, "of a man's hat." By the force of alluvion and deposit the exposure became larger and larger, until by degrees, it formed an island of about 67 acres, which in consequence of a tradition that a vessel laden with peas had once sunk on the spot where the island afterwards rose, got the name of the Pea Patch Island. In 1784, the proprietaries of West Jersey granted this island, describing it as situate in Salem county, New Jersey, to persons whose title became afterwards

vested in Dr. Henry Gale, of that State; and in 1831. the same State, by an act of its Legislature, relinquished to Dr. Gale whatever interest it might have in the island.

In 1813, the State of Delaware, by an act of its Legislature, conveyed the Island to the United States, who soon after took possession of it and began to erect a fortress upon it. In consequence of these two grants, a controversy as to the right to the island began between Dr. Gale, claiming under the title of New Jersey, and the United States, claiming under that of Delaware. Opinions of directly opposite conclusion on the title, had been given by Messrs. Rodney and Geo. Read, of Delaware, by Messrs. Richard Stockton, M'Ilvaine, Southard, G. D. Wall, and J. S. Green of New Jersey, by Mr. Willis Hall, of New York, by Messrs. Penrose and Gilpin, Solicitors of the Treasury, and finally by Messrs. B. F. Butler and L  gar  , Attorneys General of the United States. On the 27th February, 1847, John Sergeant, Esq., of Philadelphia, was appointed *sole Arbitrator*, with full power and authority, at such times and places as he might appoint, to examine witnesses and receive evidence according to the rules of law and equity, and to decide the question of the title to the said Pea Patch Island, as derived by the United States from the State of Delaware, and by James Humphrey, claiming through Henry Gale, deceased, from the State of New Jersey. His decision and award made in writing to be *final and conclusive*. The United States were represented by special counsel, to wit:—The Hon. John M. Clayton, of Delaware, formerly Chief Justice of that State, and now its representative in the Senate of the United States, and by James A. Bayard, Esq., of the same State, formerly District Attorney of Delaware, for the United States.

Mr. James Humphrey was represented by the Hon. George M. Bibb, of Kentucky, successively a Judge, Chief Justice and Chancellor of that State; also, at one time its representative in the Senate of the United States, and more lately the Secretary of the Treasury of the United States under President Tyler; and by the Hon. John H. Eaton, of Tennessee, Secretary at War under President Jackson, and subsequently Minister Plenipotentiary of the United States at the Court of Spain.—The case was learnedly and deliberately argued on both sides; and Mr. Sergeant, after taking several weeks consideration of it, delivered a written opinion on the 15th January, 1848, setting forth very fully the grounds of his award.

This opinion discusses the subject of the title of both States, in the most ample, satisfactory and elaborate manner. Much patient attention is given to the evidence, both on the one side and on the other.—The arbitrator's opinion will hereafter be a most valuable historical re-

pository for the States of New Jersey and Delaware. The case is peculiarly interesting as an historical one, and deserves the careful perusal of all historical scholars.

We feel bound to notice the manner in which this volume has been prepared by our friend the Reporter. The references are all carefully noted in the margin, and neatly printed there, with a running commentary of the contents of the pamphlet properly prepared to facilitate reference.

No pains have been spared to make the pamphlet highly useful to the profession by every means in the power of the Reporter. As this is an *Appendix* to Wallace's Reports, we suppose the whole book will be printed and prepared in the same general style, and if so, it will be one of the very best volumes of Reports so far as the reporter's duty is concerned, that we have yet seen.

The United States Album.—This is one of the most splendid publications of the age. It is by J. FRANKLIN REIGART, of Lancaster, Pa. It contains autographs of the President and Cabinet, of the Members of the 28th Congress, of the Judges of the Supreme Court, of the Ministers, and other officers of Government. It is embellished with a beautiful copy of the Declaration of Independence, elegantly printed in LETTERS OF GOLD, with a fac simile of the signatures of the signers. It contains engravings of the Capital, the President's House, the buildings of the different Departments, &c. The arms of each State are accurately and elegantly given. There are numerous other illustrations, among which are correct likenesses of the President, the Vice President, and the President elect. It is bound in a style of unsurpassed richness and splendor. Those who wish to obtain a book highly useful as well as ornamental, would do well to purchase the *United States Album*.

THE COMPLIMENTS OF THE SEASON.

In the reign of Henry 8. the Council of the Household of Lady Mary, the Princess of the Realm, made official application to Cardinal Wolsey, for his direction respecting New-Year's Gifts for the King, Queen, &c. In the time of Queen Elizabeth, the Judges wrote complimentary letters to her Royal Highness on New-Year's day. The practice of presenting small presents still continues; and those who do not send gifts bestow

good wishes—such as “a happy New-Year.” The following small tokens of remembrance to a few of our personal friends will serve to show that we think of them and appreciate their merits in this season of good feeling.

James K. Polk.—As the head of a long dominant party, preparatory to surrendering the reins of Government, he has placed on record his views of the prominent Constitutional questions heretofore under discussion.—This was just to himself, to his opponents, and to his country.

Hon. Geo. M. Dallas.—Although reported in the official account of the political battle of the 7th November last, “killed by the explosion of a tariff bomb-shell from Capt. J. H. Campbell's Schuylkill county battery;” we give him a welcome restitution to professional life, as one of the bright ornaments of the Pennsylvania Bar.

Hon. James Buchanan.—Our political revolutions, unlike those of Europe, send patriots home to their friends. When Mr. Buchanan retires, covered with honors, to his beautiful *Wheatland*, may he enjoy “a long life and a good wife.”

Hon. Robert J. Walker.—No conflict of opinion on the measures of Government can prevent the Nation from acknowledging him as the Hercules of the age. In addition to the unexampled labors of the Treasury Department, *proper*, he has, since the 10th March, 1845, investigated and “pronounced judgment in upwards of five thousand cases involving land titles.”

Hon. Roger B. Taney.—The highest in Judicial station and the greatest in Judicial merit. His style is as pure as the light with which he illuminates the path of thirty confederated nations in their career of peace and glory.

Hon. Samuel Nelson.—On the Circuit, in the wilds of Steuben—in bank as Chief Justice of the Empire State, and at Washington as a Justice of the Supreme Court of the Union, we have marked his course for more than 25 years. His learning, his high judicial integrity, and the masculine energy of his mind, will be held in perpetual remembrance.

Hon. Robert C. Grier.—He represents with more power than polish the talent and learning of Pennsylvania in the great Federal Court at Washington. Borrowing from his own homely classics, recently perfumed with “the odor of judicial sanctity,” we might “go further and fare worse.” 7 Barr 61.

Gov. Johnston.—He has revolutionized Pennsylvania. If he should perform the same office for the banking system, he would receive the applause of an undivided people.

Chief Justice Gibson and his Associates.—We have circulated abstractions of their lore far and wide, and examined their decisions with freedom. We send them our friendly greeting and good wishes for a long continuance of health and prosperity.

Hon. Charles Huston.—His eloquence at the Bar and his services as a Judge of the Supreme Court of Pennsylvania, are not forgotten in his retirement. It is hoped that the accidental destruction of the manuscripts for his proposed book on the land titles of the State, may not discourage him from a labor for which he is confessedly better qualified than any man now living.

General Taylor.—He has done the State great service in the field.—Let him have a fair trial in the Cabinet.

Solon Borland.—The admirable letter of the new U. S. Senator from Arkansas, declining to accept a challenge, will, like the wise laws of his great namesake, furnish a "rule of action," which shall be held in honored remembrance forever. Men of true greatness and courage can afford to "look down contemptuously upon the low ambition of the duelist."

The New-York Legal Observer and the Code Reporter.—Let them be reconciled to each other. It is against the Canons to be at variance.

The Boston Law Reporter.—A star in the East.

The Western Law Journal.—It lights the march of Empire in the West.

Thomas Ritchie.—The Patriarch of the tribe: "the merry heart that ne'er grows old." The cloud of political defeat may darken his countenance, but its silver edges betray the sun-light behind. We have directed our Secretary to send him a copy of Chateaubriand's poem entitled "*Nous Verrons.*"

The National Intelligencer.—Since there *must* be a change, we present our hearty congratulations to this ably conducted journal on its prospects of being, as of old time, the Organ of the Government.

The Newark Daily Advertiser.—The endorsement by this able journal of our review of the New Jersey Reports, is highly complimentary—but there is a mistake in reference to the authorship. The review was written by a co-editor who knows all about New Jersey affairs.

Godey's Lady's Book.—We would say a word about the rich blaze of magnificence in which the January number of this splendid periodical makes its appearance; but the only way to get a proper idea of it is to subscribe for the work.

THE
AMERICAN LAW JOURNAL.

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FEBRUARY, 1849.  
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CONSTITUTIONAL LAW—THE BANKING SYSTEM.

The Constitution of Pennsylvania declares that “ *no corporate body shall be hereafter created, renewed or extended*, with banking or discounting privileges, without six months’ previous public notice of the intended application for the same, in such manner as shall be prescribed by law.” The nature of this provision, and the history of Pennsylvania, sufficiently show that it was intended as a restriction to prevent *individuals* from obtaining *exclusive privileges*, not enjoyed by the people at large, by *applications* made to the members of the Legislature, without any notice to the public. That it was intended to operate upon persons desirous of obtaining charters granting exclusive privileges, and not upon the representatives of the people in the exercise of their general legislative powers, is also apparent from the law prescribing the time and manner in which individuals desiring to obtain a *monopoly* of these *privileges* are required to give notice of their intended *application*. The Constitutional restriction can have no operation upon the Legislative power, where no

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application is made by *individuals*, and where no *exclusive privileges* are conferred upon any person or persons; and where the Legislation has for its sole object the *repeal of the law which restrains* the citizens from the common right of exercising the banking business, and is designed to restore to *all* an equal right upon terms which the safety of the public may require.

This is the construction which a similar clause in the Constitution of New York has received from the Legislature, the Supreme Court, and the Court of Errors. The Constitution of that State declares that "the assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes, or *creating, continuing, altering, or renewing any body politic or corporate.*" When the act of 18th April, 1838, entitled "an act to authorize the business of banking" was enacted by the Legislature, it received, in point of fact, the sanction of two-thirds of the members of each branch; but a question arose in the Legislature, whether the act was a law "creating" "any body politic or corporate" so as to require a certificate of the fact that it had received the assent of two-thirds of the members.—The decision of the Legislature was that the bill was not within the meaning of the Constitutional restriction; and it was therefore simply authenticated in the usual way, without a certificate that it had received the assent of two-thirds.

Actions were afterwards brought by Beers, President of the North American Trust and Banking Company, vs. Warner & Ray, to recover the amount due on a promissory note, and by Stevens, President of the Bank of Commerce in New York v. Bolander, on a similar cause of action. The plaintiffs were banking companies established under the act of 18th April, 1838, and an objection

was made that the act under which they were organized was unconstitutional because *it did not appear to have received the assent of two-thirds of the members of each branch of the Legislature*. The Supreme Court of the State decided that the law was Constitutional and rendered a judgment in each case that the plaintiff was entitled to recover. The defendants thereupon removed the causes to the Court for the Correction of Errors. They were argued in February, 1840, and were decided in April following, in favor of the Constitutionality of the law. Many points of interest arose in the course of the discussion, and able opinions were delivered by the Chancellor, by the President of the Senate, and by Senator Verplanck. The case will be found reported in 23d Wendell's Reports, 103 to 190.

The distinguished Chancellor Walworth, delivered his opinion that the Constitutional restriction "was intended to guard against the increase of joint stock corporations, either for banking or any other purposes of trade or profit, the charters of which *conferred exclusive privileges*, and which when obtained were beyond the reach of general Legislation, so that they could neither be modified or repealed. The provision was not intended to restrict the power of the Legislature so as to prevent the granting of *an equal right or privilege to all the inhabitants of the State*, or as many of them as chose to associate together for purposes of trade or other lawful business, during the continuance of the act granting the privilege, provided such privilege was at all times subject to the control of general Legislation."

Senator VERPLANCK, whose reputation as an author and a jurist is well known, entertained similar views. He declared that "the general banking law is not a violation of the Constitution. That the provision referred to was intended to guard against the undue increase of institu-

tions enjoying *exclusive privileges* and operating as *monopolies*. The act in question, instead of conflicting with the Constitutional inhibition, *comes directly in its aid by opening the business of banking to ALL who choose to engage in it, upon compliance with the requirements of the Legislature.*"

The President of the Senate, BRADISH, delivered an opinion in harmony with the views of the Chancellor and of Senator Verplanck, on the point under consideration. He declared that "the right of banking was a **COMMON RIGHT** and had been so enjoyed until the passage of the *restraining law*, which converted that which had been a *common right* into a *great State monopoly*. From this moment every bank charter was a special grant of a portion of this *monopoly* and was the more valuable as that *monopoly* was the more *absolute* and *exclusive*. The *evil* intended to be remedied was not so much the creation of corporations generally as the character of *exclusive monopoly* of bank charters, under the *restraining law*, and their undue multiplication. Does the general banking law come within this *evil*? Does it come in aid of this great monopoly in banking? Does it take a right common to all and grant it exclusively to a few? On the contrary by repealing *pro tanto* the *restraining law*, *it breaks up this great monopoly and restores to the citizens generally that common right, of which they had been long and wrongfully deprived*. Instead, therefore, of increasing this great evil of monopoly, it actually comes in aid of its remedy, and both in its principle and operation, contributes to the attainment of the great object of the Constitution itself. We therefore come to the conclusion that the general banking law is not within the *evil*, and consequently not within the *remedy* of the Constitutional restriction. It follows that this law, even if it authorize the creation of an indefinite number of corporations, is valid; and was

Constitutionally passed, although it may not have received the assent of two-thirds of the members elected to each branch of the Legislature."

All the members of the Court for the Correction of Errors, with but a single exception, (twenty-three being present,) voted in affirmance of the Constitutionality of the act of 1838, "although it may not have received the assent of two-thirds of the members elected to each branch of the Legislature;" and all the members, except three, voted that "the associations organized in conformity with the provisions of the act entitled "an act to authorize the business of banking," passed the 18th April, 1838, are *not* bodies politic or corporate within the spirit and meaning of the Constitution." 23d Wendell's Reports, p. 190.

This decision is entitled to great consideration, because it was pronounced, in the first place, by the LEGISLATURE, a large body of men selected by the people for their wisdom, and acting under their oaths to support the Constitution, and because the decision was pronounced purely upon the principle involved, without the slightest pressure arising from a desire to secure the enactment of the law, for the bill had, in point of fact, as we have seen, been passed by a vote of two-thirds. In the next place the Constitutionality of the law was affirmed by the SUPREME COURT of the State. And in the last place, the question was finally settled by the almost unanimous judgment of the COURT FOR THE CORRECTION OF ERRORS.

That the reasoning of the Judges, and their decisions upon the question, are applicable to the Constitution of Pennsylvania, and to other States having similar clauses in their Constitutions, is apparent from the similarity of the restricting clauses and the identity of the objects in view. It is true that in the one case six months notice is required and in the other a vote of two-thirds, but both

conditions are applicable to laws "creating, renewing or extending" "corporate bodies." In New York the restriction operates upon *all laws "creating, continuing, altering or renewing any body politic or corporate."* In Pennsylvania the restriction applies only to laws "*creating, renewing or extending bodies corporate with banking or discounting privileges.*" But in both States the restriction is against laws for the *creation, renewal or extension of corporate bodies*: and the manifest object in each State, was to restrain the granting of *monopolies*, and not to restrain the representatives of the people from legislating in favor of the public interest and the *equal rights* of the *whole people* by bills which neither "created, renewed or extended" corporate monopolies.

The present Comptroller of New York, whose opinions will attract the more attention by reason of his new and elevated position as Vice President of the United States, very properly recommends the withdrawal of Bonds and Mortgages as an insufficient security for the redemption of issues under the Free Banking System, and suggests the substitution of stocks of that State and of the United States. He expresses a decided opinion in favor of that system of banking, and recommends its general adoption by the several States as the best method of securing "a sound and uniform currency," and of putting an end forever to the "blasting cry of *repudiation.*" Ohio has acknowledged the soundness of the principle involved, but the *old hats* and *old clothes*, which she has stuck into the windows, prevent her from perceiving "the full and perfect day." The new Governor of Pennsylvania, when a Senator, evidently perceived some rays of the light that was breaking on both sides of him. He descended into the well of TRUTH far enough to catch a glimpse of the stars that were shining in perpetual brightness above. But, judging from his bill, as reported, his usually

clear and masculine mind had either not been fully immersed in the chrystal waters of the fountain, or his political sagacity induced him to decline a baptism which would have been regarded as altogether irregular by many of those whose participation was necessary to his confirmation.

It is probable that the public mind in Pennsylvania may, at no distant day, become sufficiently enlightened to understand the two fundamental principles of banking—COMPETITION and SECURITY. The first will never be lost sight of where there is a real respect for the equal rights of the people, and an honest desire to correct the evils of favoritism which always go hand in hand with monopoly. The second, (security for the redemption of the issues) will always be provided for by an available pledge, amply sufficient to cover the whole circulation, where there is intelligence enough to comprehend the causes of the ruinous fluctuations and failures which are the concomitants of every system that admits an *unlimited circulation without any security for its redemption.*

It is not our purpose to discuss the policy of the banking system; but it falls within our province to bring into view the Constitutional question involved, and the decisions which have been had upon it, in order that it may appear that the Constitution of Pennsylvania presents no obstacle whatever to such reforms as the public interest may require, provided that in the Legislation to be adopted *equal advantages be extended to the whole people and no exclusive privileges be granted by charter to a favored few.*

STATE OF NEW JERSEY—MERCER CIRCUIT.

JAMES L. JAKUES v. WILLIAM McKNIGHT.

This case was tried at the Mercer Circuit, and a verdict taken subject to the opinion of the Court on the facts as disclosed in the evidence.

1. A blank endorsement on a promissory note not negotiable, does not render the endorser liable upon failure of payment by the drawer.
2. Such endorsement does not exclude proof of a guaranty by parol evidence.
3. Such guaranty expressed in general terms, is personal between the parties to it, and a third person, to whom it has been transferred, cannot recover on it in his own name.

RANDOLPH J., delivered the opinion of the Court :—
The due bill given by Richard Jaques, is in this form :
“ Due William McKnight, one hundred dollars—pay on demand.” This, though not in form, is in effect a promissory note payable on demand to William McKnight; but not being to him or order, or bearer, is not negotiable. It has all the requisites of a promissory note—is for a sum certain—payable at a particular time, not contingent or out of a special fund; no form of words is necessary to create a promissory note. See Chitty on Bills 54-5. Story on P. Notes 1.

The bill or note not being negotiable, of what effect is the blank endorsement of the payee? So far as it regards the note itself, it is a mere authority to the holder to use the name of the payee to collect the note, and this he would have as a matter of course, by the mere transfer by delivery—it creates no liability against McKnight as endorser; if liable at all it must be by virtue of some new contract as guarantee or otherwise. It was competent for him and Samuel Jaques to enter into any new

contract respecting the note, for McKnight to become liable as a mere collateral security; such new contract could be made as well after as before the statute of frauds, depending in both cases upon the same principles; but the statute in some instances requires the contract to be in writing in order to be valid. The plaintiff seeks to recover on this as on an original guaranty. A guaranty is defined to be a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance. Smith on Mercantile Law, 277. Story on Promissory Notes, sec. 457. In *Leonard v. Vreedenburgh*, 8 John. R. 29, Kent Ch. J. reduces this species of contracts to three classes, and the same distinction has been recognized by subsequent authorities. 1. Where the promise is collateral to but made at the same time with the original contract. 2. Where the collateral undertaking is subsequent to the creation of the original debt, and that is not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. 3. Where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The first two classes come under the statute of frauds and must be in writing; but the third being an independent engagement upon new consideration, is not within the statute and need not be in writing. In construing cases as they have arisen, the governing principle of the courts has been, as indeed in construing all other contracts, to give effect to the intention of the parties, so far as that can be done without violating the statute. Story, sec. 479. 1 American Leading cases, 181.

Under the first class where the indorsement was made by a third person, not the payee, as the person so in-

dorsing could not be held liable as a mere endorser, resort has been had to the original contract between the parties, and he has been considered liable as a joint or several maker, upon the new indorsement alone in some of the States. 1 Am. Leading Cases, 177. Story, sec. 476.—And in others, upon that and proof of the contracts being such as to warrant his being so charged, so held in *Leonard v. Vreedenburgh*, before cited, and recently in our Supreme Court, in *Ackerman v. Westervelt*. But in *Chambers v. Crozier & Moon*, 1 Spencer 256, the court decided that a mere blank indorsement was insufficient to authorize a guaranty to be written over the signature, or to charge the indorser as guarantor.

Under the 2nd class there have arisen many cases giving rise to some very nice, not to say very untenable distinctions, which it is unnecessary here to notice, as the present case must be maintained under the 3rd class if under either. What did McKnight mean by indorsing the note in blank—not to become a mere indorser, for the note was not negotiable—the mere indorsement, according to the view of the law in this State, does not imply what was the contract or the consideration. We must therefore resort to parol evidence to get at the intention of the parties, and that shewing that the agreement of McKnight & S. Jaques, was that the former guaranteed the note, that is, upon new consideration passing between them, made himself personally liable for the payment of the sum mentioned in the note, and that would authorize the party to write over the name what the contract was, the blank indorsement or guaranty gave full authority for that, and to charge the party accordingly. *Slingerland v. Morn* 7 Jno. R. 463. *Leonard v. Vreedenburgh* 8 do. 29. *Josslyn v. Ames*, 3 Mass. 274. *Ulen v. Ketteredge*, 7 Mass. 233. *Ackerman v. Westervelt*—and opinion of Ch. J. in *Chambers v. Crozier & Moon*. But I should feel

no hesitation in coming to this conclusion without these authorities, for the contract being an original one and not within the statute of frauds, may be by parol and proved in the same way as any other contract, and the indorsement in blank being a sufficient warrant to over write or charge the contract according to the intention of the parties, obviates the objection of its being partly in writing and partly by parol or *in pais*. See *Meeck v. Smith*, 7 Wend. 315. I do not consider demand and notice necessary; if it were, however, the fact of the drawer's insolvency, discharges that objection. Story sec. 460.

But another objection has been raised which in my opinion is fatal to this suit, and that is that this guaranty or contract between McKnight and S. Jaques, was personal between them and not transferable to another. No doubt a guaranty may be made negotiable or otherwise, but the mere blank endorsement does not render it so nor does the parol proof, for that was a mere guaranty in general terms which is insufficient to warrant the transfer to the plaintiff—it would be equivalent to the transfer of a mere verbal contract—a contrary doctrine is held in some of the European countries, but not in the United States.—Story, secs. 481, 483, 484. *Watson's Ex'rs. v. McZann*, 19 Wend. 557. *Lamourieux v. Hewit*, 5 do. 307. The verdict must therefore be set aside and judgment of non-suit be entered.

LENNIG v. TOBEY.

In the District Court of Philadelphia.

1. Notice of protest for non-payment of a promissory note, *personally* delivered on the proper day, to wit: the 25th May, 1846, is not vitiated by being *post dated* by mistake, 26th May, 1846, the mistake being one which could not have misled the endorser.

The facts of the case fully appear in the following opin-

ion delivered on the 23rd September, 1848, by Mr. Justice STROUD.

This was an action of assumpsit on a promissory note for \$727 08, dated January 22, 1846, made by Thomas Mercer, Son & Co., payable four months after date to the order of the defendants by whom it was endorsed and delivered to the plaintiff. The parties resided in this city and the note was made here. One of the pleas was that the defendants had not due notice of the non-payment of the note.

On the trial, the plaintiff having read the promissory note, called Francis J. Troubat, Esq., Notary Public, who testified as follows: "on the 25th of May, 1846, at the request of the Mechanics' Bank, I presented this note to the makers at their counting house on the wharf, and demanded payment. They declined payment, saying it was an affair of the endorsers. I went immediately to the counting house of the endorsers, the defendants, on the wharf about a square off. I had the notice of protest in my pocket. I handed it to one of the defendants. This is the notice. This notice was then read as follows:

Philadelphia, May 26, 1846.

Payment of Thomas Mercer, Son & Co's. note, in favor of yourselves and by you endorsed for \$727 08, and delivered to me for protest by the Mechanics' Bank of the city and county of Philadelphia, the holders, being this day due, demanded and refused, it has been by me duly protested accordingly, and you will be looked to for payment, of which you hereby have notice."

The notice was addressed to the defendants.

The witness continued: "I made a mistake in the date of this notice. It should have been dated the 25th of May instead of the 26th."

The counsel of the defendants contended that this evidence was insufficient to charge the defendants as endor-

sers of the note, and cited *Etting v. Schuylkill Bank*, 2 Barr 355.

The Judge reserving the point, told the jury the evidence, if believed, was sufficient. The verdict was for the plaintiff.

The only question is, was this direction right?

Mistakes not only of time but of other circumstances, in notices to parties, are of frequent occurrence and have again and again been the subjects of judicial determination. And the test which has been generally applied has been whether or not, the *mistake* has *misled*. In some instances the Court has decided directly, and in others, referred the question to the jury.

In *Elder v. Hays*, 1 Chitty's Reports 11, notice of executing a writ of inquiry, "*on Wednesday the 11th of June instant*," when Wednesday fell on the 10th of June, on which day the writ of inquiry was executed, was held sufficient, and the Court refused to set aside the execution of the writ of inquiry, the defendant not swearing that he was misled thereby. A similar decision had been previously made in *Batten v. Harrison*, 3 Bos. & Pul. 1.

Again, on the very subject of notice to endorsers of the non-payment of notes by the makers, the same principle has been applied through the instrumentality of the jury. Thus, in *Smith v. Whiting*, 12 Mass. R. 6, where in the notice the name of the maker of the note was erroneously given, and the note was stated to have become due *before* the days of grace had expired, it was left to the jury to say, whether the endorser had thereby been misled. The jury found that he had not, and the Court *in banc* sanctioned the ruling on the trial. *Reedy v. Seixas*, 2 John. Ca. 337, furnishes a similar example. And in *Ontario Bank v. Petrie*, 3 Wend. 456, it was held, that where in a notice of non-payment *dated* on the day that a draft fell due, it was stated that the draft had been protested on the

evening *before* for non-payment, and that the holders would look to the endorsers for payment, it was proper to submit the question to the jury, whether or not, the endorsers had been *misled*. But the authority of this case has been since overthrown by a decision of the same Court, in *Ransom v. Mack*, 2 Hill 588. There a note became due on the 3rd of July, and payment of the maker was then demanded, but the notice stated that it had been demanded on the 4th, and then refused. The Circuit Judge relying on *Ontario Bank v. Petrie*, submitted to the jury the question whether the endorser had or had not been misled by the notice. The Supreme Court reversed the judgment in consequence of this ruling, on the ground, that the facts having been ascertained, it was the duty of the Court to declare the law, and that in judgment of law, no notice had been given to the endorser.

The principle of *Ransom v. Mack* has been acted upon by the Supreme Court of this State, in *Etting v. The Schuylkill Bank*, 2 Barr. 355. The mistake in the notice in this case was in dating it one day too early—*on the second day of grace*—and informing the endorser that payment had been demanded on that day. In point of fact, the demand had been at the proper time and was so stated in the protest, which was given in evidence without objection. Here the Court below acted in accordance with *Smith v. Whiting*, *Reedy v. Scizas*, and *Ontario Bank v. Petrie*, already particularly noticed, and submitted the question of mistake to the jury. The judgment was reversed.

The reversal was put on two grounds. 1. That as the protest was the act of a *foreign* notary, “it was evidence of the fact of protest, *but of nothing else*.” There was therefore no evidence whatever of demand, and refusal to pay, and so the jury ought to have been directed. This glaring defect in the evidence of the plaintiff, owing most

probably to the absence of the retained counsel of the defendant, and the introduction of other counsel on the spur of the moment, was overlooked at the trial.

2. The other ground—the submission to the jury to determine as to the supposed conflict of evidence or as it was viewed in the Supreme Court, the effect of the mistake of day in the written notice of non-payment, was fully considered in that Court, and the cogent reasoning of the Chief Justice by whom the opinion was delivered, led to a result equally fatal to the judgment below.

On the argument on the rule for a new trial in the present case, the defendant's counsel relied upon the authority of the two decisions last referred to. And if they were directly in point, as he seemed to think, he would be entitled most certainly to our judgment. As to the case of *Ransom v. Mack*, it comes to us as the unanimous opinion of the Judges of the Supreme Court of New York, sustained if not founded upon a then recent decision of the Court of Errors, the highest judicial tribunal in that State. And in respect to *Etting v. The Schuylkill Bank*, it is our plain duty in this, as it is alike our practice and our duty in all cases vouching the same authority, to yield implicit obedience.

The facts of those cases, however, are not analagous to the facts of the case now before us. Where the time stated in the notices *had already past*, the parties addressed might naturally, if not necessarily, have been *mised*. While to assert that a series of transactions *had* taken place on a day then *future*, was an absurdity because an impossibility, by which no one could have been deceived.

The determination of this case, then, depends essentially upon this difference in its facts from the facts of all the decisions already mentioned.

It is a well settled mercantile law, that notice of the dishonor of a promissory note or bill of exchange, need

not be given in writing. It may be communicated orally to the party to be affected by it. It may, of course, according to the will of the person charged to make it, be *partly* oral and *partly* written.

Here the plaintiff proved by the Notary, that payment was demanded and refused on the 25th of May, which was the proper time, and that on the same day, immediately afterwards, he put into the hands of one of the defendants, at their counting house, a written notice of the dishonor, which was accurate in all respects but one : namely, that it was *post-dated* a single day. The promissory note was truly described—it was stated to have become due, been demanded, refused, and thereupon duly protested. The endorsers were, moreover, warned that they would be looked to for payment.

Being parties to the note, the defendants were bound to know at what time it fell due. They knew, therefore, that that time was the 25th of May—they knew, too, that the notice was handed to them on that very day ; and its contents showed plainly that it had been inadvertently *post* dated by the Notary.

We consider the true view of the case to be this :—The 26th of May, not having yet arrived, was when the notice was served, an *impossible* day, and on that account should be altogether disregarded. The notice must be treated as not having a written date. The time of its delivery, which was personal to the defendants, as proved by the Notary, is to be taken as its proper date, and its contents in all other respects to be read in reference to it.

Apart from the reasonableness of such a procedure, which carries with it its own commendation, there is not wanting strong authority to sustain it. In *Doc on the demise of the Duke of Bedford v. Kightley*, 7 D. & E. 63, on the trial of an Ejectment, the defendant, who was tenant to the lessor of the plaintiff, objected to the notice to

quit, which was served just before *Michaelmas*, 1795, and was to quit "at *Lady-day*, which will be in the year 1795." The plaintiff was hereupon *non-suited*, but upon a motion to set aside the nonsuit, the Court *in banc* made the rule absolute, LORD KENYON, C. J. saying, "the time when the notice was given and the words in it, "*which will be*" manifestly showed that this was a notice to quit at the *then next Lady-day*. Then the year 1795 in the notice may be rejected as an *impossible year*."

So, where "the writ was tested on the 28th of November, in the 49th year of his Majesty's reign, and was returnable in eight days of *St. Hilary*, but the notice required the defendant to appear *on the 20th day of January*, 1808;" a rule was obtained to shew cause why the proceedings should not be set aside.

Here the writ was tested *subsequently* to the day at which the party by the notice at its foot was required to appear, and although the statute of 5 G. 2. c. 27, was express that no process should be good without an English notice at the foot to explain the writ, and it was urged that an ignorant defendant could not know from this when he was to appear; yet, the Court discharged the rule, observing, "that as the notice was to appear at the return of the writ, which was tested *subsequently* to January, 1808, no man could understand it to require an appearance in January, 1809. The defendant must know that his appearance was regarded at a *future* and *not on a past day*. It was, therefore, an immaterial mistake, which could do no harm, for what other day could occur to him than the 20th of January 1809. It was quite impossible that the party should not understand that to be the year intended." *Steele v. Campbell*, 1 Taun. 424.

As no reason is perceived for a difference in the law regulating bills of exchange and promissory notes, or a subject of this kind, from the law of landlord and tenant,

or that which concerns process of courts, the rule for a new trial should be discharged and judgment entered for the plaintiff on the verdict.

U. S. District Court. Southern District, N. Y.

DANIEL SMITH. LIBELLANT. v. THE PILOT-BOAT BLOSSOM.

Mitchell and others, Claimants.

COLLISION :

A look-out, independent of the man at the helm, is indispensable.

A light hung under the bowsprit of the pilot-boat on a cruise for vessels, held not to be a proper precaution in the place of a look-out.

A vessel sailing free is responsible for keeping clear of one close hauled.

It is not required that a vessel close hauled should show a light when the night was such as that a competent look-out on board a vessel sailing free could have discerned her in time to have steered clear.

Held, that the mate of a schooner might properly station seaman forward on the look-out, and himself take the helm and regulate the vessel's movements under emergencies, according to their hails to him, instead of reversing such order of things.—6 *Leg. Obser.*, 375.

INDICTMENT FOR OBTAINING MONEY BY FICTITIOUS RECEIPT.

Plea—Jurisdiction of the State on account of Crimes committed out of the State.

A. was indicted in the city of New York, for obtaining money from a firm of commission merchants, in that city, by exhibiting to them a fictitious receipt signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce for the use of and subject to the order of the firm. The defendant pleaded that he was a natural born subject of Ohio, and had always resided there, and had never been within the State of New York; that the receipt was drawn and signed in Ohio, and the offence was committed by the receipt being presented to the firm in New York, by an innocent agent of the defendant, employed by him while he was a resident of and actually within the State of Ohio:—

Held, that the plea was bad, and that the defendant was properly indicted in the city of New York.

Where an offence is committed within this State by means of an innocent agent, the employer is guilty as a principal though he did not act in this State, and at the time the offence was committed resided in another State.

In such case the Courts of this State have jurisdiction of his person, and he may be arrested and brought to trial.

Where an offence is committed within this State, whether the offender be at the time within this State, or be without the State, and perpetrates the crime by means of an innocent agent, it is no answer to an indictment that the offender owes allegiance to another State or sovereignty. *Adams v. The People*, 1 Comstock's Rep. Court of Appeals, 173.

CONSTRUCTION OF GRANTS OF FRANCHISES.

Tolls on the Camden & Amboy Rail Road and Transportation Company.

The following important decision of the Supreme Court of New Jersey will be interesting to our readers throughout the United States. The commanding location of the great corporation, whose claims have been the subject of examination, renders any restriction or extension of its privileges, by construction or otherwise, highly interesting to the business and traveling community of the whole country. But the decision acquires additional importance from the fundamental principle of construction really involved, although the learned Judge who delivered the opinion, did not find it necessary to assert it in pronouncing the judgment. From the prevailing inattention to public rights, and the facility with which they may be subverted by general or ambiguous expressions, designedly introduced into a statute for the purpose, public policy has demanded and established a rule of construction, where those rights are involved, altogether different from that which prevails between private individuals. The maxim of *nullum tempus* rests upon this foundation. A strong illustration of this may be found in the case of *Duncan v. Reiff*, 3 Pen. Rep. 368, in which the salutary principle that a Sheriff's sale discharges *all* liens and gives the purchaser a title free from incumbrances, was held to be inoperative upon liens held by the Commonwealth. If a strict construction be applicable to controversies in which an humble individual is claiming in opposition to the public, it becomes imperative where a powerful corporation sets up a claim to exclusive privi-

leges. The ordinary pretensions to exact tolls from the public without limit, and to be exempt from a just share of the public burdens, are the most common, as well as the most appropriate occasions for the application of the usual rule of construction, where popular rights are involved.

The remarks which are subjoined to the decision are furnished by a correspondent whose high character and eminent legal abilities give to his views a claim to the greatest consideration. We are assured that he has no other concern in the question than as a lover of jurisprudence, and a citizen interested in the general welfare.—
Ed. Am. Law Jour.

SUPREME COURT OF NEW JERSEY, JAN'Y TERM, 1848.

<i>The Camden & Amboy Rail Road and Transportation Company</i> vs. <i>Peter Briggs.</i>	}	ON CERTIORARI.
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Field and Potts, for Pl'ff. Halstead and Vroom, for Deft.

1. Under the 16th section of the act incorporating the Camden and Amboy Rail Road and Transportation Company authorizing the company to "demand and receive tolls for the transportation of every species of property *thereon*, as they shall think reasonable and proper; provided that they shall not charge more than at the rate of 8 cents per ton per mile, for the transportation of every species of property." the company have no right to demand and receive a higher rate of toll than that above prescribed, for transportation by steam-boats on that part of the line lying between New York and South Amboy

2. The act of 15th March, 1837, under which the United Delaware and Raritan Canal and Camden and Amboy Rail Road and Transportation Companies were authorized to make the *Trenton Road*, places those companies under "all the provisions, conditions, liabilities, limitations and restrictions, to which they were then subject under their several acts of incorporation." and thereby extends to the Trenton Road the limitation fixing the rate of toll at a sum not more than 8 cents per ton per mile.

The Opinion of the Court was delivered by NEVIUS, Justice.

This action was brought by the defendant in the certiorari against the plaintiffs, to recover a penalty of \$100

under the act to prevent the taking of unlawful toll or fare on Canals and Rail Roads. for an alleged violation of law in charging more than they were authorized to charge for the transportation of certain merchandize from the city of New York to the city of Trenton by the way of South Amboy and Bordentown.

The facts, as agreed upon by the counsel of the respective parties, are these: "On the trial before the Justice, the plaintiff below proved that the defendants, on the 29th of January, 1846, charged Briggs and Bacon, partners, 96 cents for one box of the weight of 240 pounds, for the transportation of the same from New York by way of the Camden and Amboy Rail Road to Trenton; that the same was transported by the steam-boat of the company from New York to South Amboy, a distance of 30 miles, thence in the cars of the company over the company's rail road to Bordentown, a distance of 35 miles, thence over the company's rail road to Trenton, a distance of 6 miles.—The whole distance being 71 miles; and that the said transportation was done by and for the benefit of said company. The bill was paid by the plaintiff to the agent of the company. The Justice gave judgment for the plaintiff below for the penalty of \$100 with costs. It is agreed by the parties, that if upon the above state of facts the plaintiff below was entitled to recover, that then the judgment be affirmed, otherwise that it be reversed."

The only question for the consideration and decision of this Court is, whether the charge made by the plaintiffs in the certiorari is greater than the law authorized them to make. The plaintiffs do not put themselves on the ground that the charge was made by accident or mistake, or from any miscalculation, but they claim that they had the lawful right to make the charge which they did make. This suit is brought under the act to prevent the taking of unlawful toll or fare on canals and railroads. passed the

12th of March, 1839. Rev. Stat. 601. This statute imposes a penalty of \$100 on any incorporated company in this State having by law a right to take toll for taking, under any pretence whatsoever, more than the charge, toll, rates, or fare, allowed by law.

By the 16th section of the act incorporating the Camden & Amboy Rail Road and Transportation Company, they are authorized to demand and receive tolls for the transportation of *every species of property whatsoever thereon*, as they shall think reasonable and proper: provided that they shall not charge more than at the rate of 8 cents per ton per mile for the transportation of *every species of property*. If this power to regulate and charge reasonable toll, with its limitations, extends to the whole distance between New York and Trenton, to wit, 71 miles, then the company have, in the case before us, charged more than by law they were authorized to charge; have subjected themselves to the penalty under the act of 1839. But the company contend that this section of their charter, limiting the rate of toll to 8 cents per ton per mile for transportation, extends only to the transportation *on their rail road* which terminates at South Amboy, and that they are not restricted in their charges for transportation by water between South Amboy and New York, or between Bordentown and Trenton, on the Trenton road; and as the charge complained of was a general charge for the whole distance between New York and Trenton, without specifying what proportion was for the water transportation, and what for the transportation on the Trenton road, it is not apparent that they have charged more than by their charter they were authorized to do; and that in the absence of proof, the legal presumption is, that the excess of their charge over 8 cents per mile, was for that part of the distance where they are unrestricted in their rate of charge. Such is the argument of the company,

and this presents the question whether their construction of the charter can be sustained.

The plaintiffs were incorporated by act of the Legislature on the 4th of February, 1830, as a rail road and transportation company, and by their charter were invested "with all powers necessary to perfect an expeditious and complete line of communication from Phil'a. to New York." And it was by their charter made their duty to provide suitable steam or other vessels, at either extremity of their road, for the transportation of passengers and produce, from city to city, so that no delay should occur for want thereof. The 16th section then, before referred to, gives to the company the right to demand and receive reasonable tolls for the transportation of persons and every species of property whatsoever *thereon*: provided that, for the latter, such tolls shall not exceed the rate of 8 cents per ton per mile. The provisions of this section, taken in connection with the general object of the incorporation, and the whole scope of the charter, are to my mind by no means ambiguous. The only difficulty (if any there be) in the construction of this section, arises

from the word "*thereon*," which the company construe as applicable only to *their road*, and not to the transportation from South Amboy to New York in their steam or other vessels. But, if this construction is right, then the company have no right or power, by virtue of any *express* provision in their charter, to regulate or to demand and receive, reasonable tolls for transporting persons or property in their steam or other vessels. The Legislature surely never intended (after requiring the company to complete the whole line of communication between city and city by means of steam and other vessels) to limit their right to demand reasonable tolls on a part only of that line. And if the right to demand and receive tolls extends by their charter to the whole distance between

city and city, the limitation to that right must be coextensive with the right itself. The word "*thereon*" cannot, therefore, by any fair or legal construction, be confined in its application to the road of the company, but extends and applies to the *whole line of communication* between city and city, which the company by their charter were authorized and required to perfect. Any other construction would defeat the whole object of the limitation. For if the company have discretionary powers to charge what they please for the transportation of persons and property between the extremities of their road and the two cities, it would be idle to limit their charges upon their road for the transportation of such persons or property as may be carried by them from city to city. In the construction of a statute, all parts of it are to be taken into consideration, and words are to be so construed (if they will bear it according to the rules of law,) as to carry out the manifest intentions of the Legislature and the object of the statute. Upon these rules I think the word "*thereon*" must be esteemed to apply to the whole line of communication completed by the company between the cities of Philadelphia and New York ; and that the company have no right, under their charter, to charge at a higher rate for the transportation of property than 8 cents per ton per mile, whether carried in their boats or in their cars.

It is further insisted by the company that this limitation as to the rate of toll, does not extend to the *Trenton road*, but that they are at liberty to make such charge for transportation of property *on that road* as they may see fit, and that therefore the judgment below must be reversed. I cannot find the ground for such an interpretation of the law. By the act of 15th March, 1837, the United Delaware and Raritan Canal and Camden and Amboy Rail Road and Transportation companies were authorized to make this Trenton road, and by the second section of the

law they were declared subject to all the provisions, "conditions, liabilities, limitations and restrictions to which they were then subject under their several acts of incorporation." If I am right in my construction of the 16th section of the charter of the rail road company, it will follow that the limitation in that section applies, and is in express terms extended, by the act of 1837, to the Trenton road.

I think the judgment of the Justice below should be affirmed with costs.

REMARKS.

The conclusion attained in the above opinion is obviously correct upon the particular line of reasoning adopted. But the community have no little cause to apprehend evils of magnitude from the future application of so narrow a rule of interpretation to the charters of the great New Jersey transportation monopolies. With sincere deference, and the greatest respect, it is suggested that the rule which the learned Court seems to have been inclined to follow, renders the decision a precedent in favor of unreasonable pretensions, which the corporations interested will not fail to advance, as occasions or pretexts may hereafter present themselves. The subject is apparently treated by the Court as though the grant to this company of the franchise to exact tolls, were subject to the rules of interpretation applicable to ordinary statutes, grants or contracts. It is the purpose of these observations to establish, upon the authority of undoubted judicial precedents, that the true rule of legal interpretation is a much more enlarged one in favor of the public; so much so, as to exclude the possibility of any latitudinary extension of the corporate franchise. The rule is conceived to be that a *mere ambiguity* in the charter of such corporation is *alone*, in any case, sufficient to deter-

mine its meaning *against the corporation and in favor of the public*. In support of this proposition a great many decisions in England and in this country might be cited.— But, for reasons which will appear, the two principally noticed will be those of the *Stourbridge Canal* in the King's Bench, in England, and of the *Charles River Bridge* in the Supreme Court of the United States.

The first of these cases, *The Proprietors of the Stourbridge Canal, vs. Wheely and Others, 2 Barnewall & Adolphus 793*,* was decided in the year 1831. The plaintiffs were incorporated by an act of parliament which had authorized the making of their canal. It was formed upon two levels connected by a chain of locks. *Upon the upper level there was no lock*. The act made it navigable upon payment of such rates as should, within prescribed limits, be demanded by the company, who were authorized to take such toll for any ton of goods navigated on *any part of the canal*, and which should *pass through any one or more of the locks*. The canal had been used to a very considerable extent, in transporting large quantities of coal, by persons, who, in navigating it, had, however, used only the *upper level*. The question was, whether the company had a right to demand what was admitted to be a *reasonable rate* of toll, for this use of that part of their canal. It was held that, as the persons thus using it *did not pass through any LOCK*, they *could not be called on to pay any thing*. This is considered a leading case in England (2 Manning & Granger 196) and in this country, (11 Peters 544,) on account of "the rule of construction in favor of the public." stated in it by Lord Tenterden, in the following words :

"The canal having been made under an act of Parliament, the rights

*In the condensed English Common Law Reports, vol. 22, this case was omitted. The profession in this country have suffered greatly by this mode of publishing reprints of English reports, which we are glad to perceive, is abandoned by the publishers.

of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the Statute: and the rule of construction, IN ALL SUCH CASES, is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public: and the plaintiffs can claim nothing that is not clearly given them by the act."

There was nothing new in this doctrine. Three years before, Chief Justice Best, (4 Bingham 452) had given as a reason for it that "if such a construction were not adopted, acts would be framed ambiguously in order to lull parties into security;" and in the year 1809, Lord Ellenborough, (11 East 685) had said:

"If the words would fairly admit of different meanings, it would be right to adopt that which would be most favorable to the interest of the public, and most against that of the company; because the company, in bargaining with the public, ought to take care to express distinctly what payments they were to receive; and because the public ought not to be charged, unless it be clear that it was so intended."

This language was adopted, and other cases of like effect cited, in 1840, by Chief Justice Tindal, in 2 Manning & Granger, 164-5, where it was held sufficient for the determination of a point of this sort that "the word is *only ambiguous* in its meaning; "for, in that case, the *general principle laid down* by Lord Ellenborough, * * * will govern," &c. The case of the Stourbridge Canal Company was said by Chief Justice Taney, in delivering the opinion of the Supreme Court of the United States, in the Charles River Bridge case, (11 Peters 544-5,) to have been "as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded."

"This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such a construction could ever be permitted in a law of that description; for, the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter."

In a similar spirit one of the Judges of the King's Bench, had said in the year 1819 :

“ Numerous applications are made to Parliament by *speculative individuals*, to form these navigable canals and railways ; *great public benefits are held out as an inducement to the Legislature to sanction these undertakings* ; and when their sanction is obtained, is it to be permitted to *these persons to say that they will do only that which is beneficial to themselves, and disregard entirely the interests of the public ?*”

This was said in a case reported in 2 Barnewall & Alderson 646, where the Court interposed by mandamus to prevent the continuance of a wanton usurpation of authority by such a corporation. The Severn & Wye Canal Company had been incorporated by two acts of parliament, with power to make and maintain a railway or tramroad, for wagons and other carriages, from and to certain designated places, to raise money and apply it for that purpose, and receive a certain rate of tonnage for goods carried along it ; and all persons were to have free liberty to pass upon and use it with wagons or other carriages of a designated construction upon payment of those rates. The company completed the railway within the the time limited for its construction, which expired about thirty-five years ago ; and for some time afterwards received tolls for the passage of carriages over a branch of it as to which the controversy arose. “ The *leading members of the company* having become the *owners of collieries situate on another branch of the rail road, the company*, a short time after the branches had been completed, *for the purpose of preventing competition from the collieries communicating with the branch of the railway,*” as to which the controversy consequently arose, “ *determined to render that branch of the rail road impassable* ; and caused the iron tramplates thereon, for a space of several hundred yards, to be taken up ; and thereby *destroyed that branch ; whereby the public*” &c. “ had been deprived of the benefit of using that branch” &c. The Court compelled the

corporation to "reinstate, and lay down again the tram-road." This case, if its citation were not otherwise pertinent to the present inquiry, will serve to exemplify the danger of abuses which the strict rule of construction that has been wisely established, can alone prevent or mitigate; where, through time-serving or improvident legislation, great public franchises are irrevocably delegated to private cliques which assume the guise of public spirited associations. The incidents of eminent domain cannot be justly parted with by a state on any different terms.—In *Arredondo's case*, in 6 Peters Reports 738-9, the ancient learning is collected in support of the legal truisms that "public grants convey nothing by implication," and "are construed strictly in favor of the King," and that "the general words of a King's grant shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, or to be deemed to be to his, or the prejudice of the Commonwealth." In 15 *Sergeant & Rawle* 130, Chief Justice Tilghman said of franchises in the hands of private corporations, what has been said in almost every State in the Union, that "the Commonwealth stands in the place of the King, and has succeeded to all the prerogatives and franchises proper for a republican government." Although "many branches of the royal prerogative would," as he added "be altogether improper in this country," there is the authority of the Supreme Court of the United States for the proposition (16 Peters 410-11,) that doctrines in favor of prerogative may be more liberally extended in favor of a government which represents the people's sovereignty, than in the case of "grants of the British Crown where the title is held by a single individual in trust for the whole Nation."

The difference is, however, less great, when we compare the grant of a franchise by an act of Legislation in this country, with one by an act of the British Parliament :

This brings us back to the case of the Stourbridge Canal. In commenting upon this decision, Chief Justice Taney, (11 Peters, 545,) used the following language :

"Borrowing, as we have done, our system of jurisprudence from the English Law, and having adopted, in every other case, civil and criminal, its rules for the construction of statutes, is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle, where corporations are concerned ? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and by implication, make the terms of a charter in one of the States more unfavorable to the public than upon an act of parliament framed in the same words, would be sanctioned in an English Court ? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception ? We think not ; and it would present a singular spectacle, if, while the courts in England are restraining within the strictest limits, *the spirit of monopoly and exclusive privileges in nature of monopolies*, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English Court of Justice." And again, on page 548, "*the continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation ; and the functions it was designed to perform, transferred to the hands of privileged corporations ;*" and on pp. 549, 550, "*In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey * * ** The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient and cheap ways for the purposes of travel, shall not be construed to have been surrendered or diminished by the State : unless it shall appear, by plain words, that it was intended to be done."

These and previous extracts are from the opinion of the Supreme Court of the United States, in the case of the Charles River Bridge against the Warren Bridge ; a

more particular statement of which will now be made.—The Legislature of Massachusetts had incorporated the proprietors of the Charles River Bridge, for the purpose of building it, with authority to take certain rates of toll, but without any *express* grant of an *exclusive* privilege over the waters of that river, either above or below their bridge, or of any right to erect another bridge themselves, or to prevent other persons from erecting one. The charter was limited to forty, afterwards extended to seventy years, at the end of which the bridge was to be the property of the Commonwealth. Until the expiration of the term, the company were to pay 200 pounds yearly to Harvard College, the proprietors of the right of disposing of a former ferry at the place where the bridge was to be made. There was a saving to the College, after the time when the bridge should become the property of the State, of a reasonable annual compensation, such as they might have received for the annual income of the ferry if the bridge had not been erected. The bridge was built, and was opened for passengers on the 17th of June, 1786, from which time the seventy years limited as the term of the privilege of the company was to be computed. This corporation paid the annuity of £200 regularly to the College, and performed all the duties required by their charter. In 1828, the Legislature of Massachusetts incorporated “The Proprietors of the Warren Bridge,” for the purpose of erecting over Charles River another bridge which was to be surrendered to the State, as soon as the expenses of the proprietors, in building and supporting it, should be reimbursed; a period that was not to exceed six years from the time of the commencement of the receipt of toll by the company. It was built, in pursuance of this charter, at the distance of a few hundred feet from the former bridge. A sufficient amount of toll having been received by the proprietors of the new

bridge to reimburse all their expenses, it became the property of the State, and was made a *free bridge*. The value of the franchise previously granted to the proprietors of the Charles River Bridge, had, by this means, been entirely destroyed. They instituted timely proceedings to restrain the new company by injunction from the erection, and afterwards from the use, of the new bridge; contending that the grant of the ferry to the College had been of an exclusive right, and that the rights of the Charles River Bridge Company had been under their charter as exclusive as the previous ferry right; that, independently of such particular reasons, this charter necessarily implied that the Legislature would not do what would render the franchise granted to them of no value. They therefore urged, *first*, that the grant of the ferry to the College, and of the charter to themselves, were both *contracts* on the part of the State—a proposition which was conceded; and *secondly*, that the law authorizing the erection of the Warren Bridge, in 1828, impaired the obligation of one or both of these contracts. This last was the point on which the decision depended. It had been “well settled by previous decisions of the court,” referred to in its opinion, “that a State law *might be retrospective* in its character, and *might divest vested rights*, and yet not violate the Constitution of the United States, unless it also *impaired the obligation of a contract*.” It had been decided by the same court, in other equally familiar cases, that *Legislative grants* to such a corporation of *such franchises* were, in the Constitutional sense, *contracts* of which the obligation would be impaired by their Legislative resumption by the State, or Legislative regrants to another. It was, therefore, in the act of the Legislature of Massachusetts incorporating them that the Court in this case were “to look for the nature and extent of the franchise conferred upon the plaintiffs.” Upon a full consideration

of the effect of this act. their bill was dismissed. The Court, after stating that there could be no serious difficulty in ascertaining "the principles of construction by which this law was to be expounded, and what undertakings on the part of the State might be implied," proceeded as follows: (11 Peters 544,) "It is the grant of certain franchises *by the public* to a private corporation, and in a matter where *the public interest is concerned*. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals." The case of the Stourbridge Canal is then cited, and after adopting Lord Tenterden's language quoted above, the Court say that the doctrine thus laid down is abundantly sustained by the authorities referred to in this case; and, after stating, in language which has already been cited, the reasons why the construction should not, in this country, be more unfavorable to the public, say (p. 546.)—"But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been fully considered in this Court; and the rule of construction above stated fully established." Authorities to this effect are then adduced, and among them 4 Peters 168, where Judge McLean, delivering the opinion of the Supreme Court, had used the words "that a corporation is strictly limited to the exercise of those powers which are specially conferred on it will not be denied. The exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation."

The following passages may be added from the opinion of the Supreme Court, in the Charles River Bridge case, p. 547:

"The object and end of all government is to promote the happiness and prosperity of the community by which it is established: and it can

never be assumed that the government intended to *diminish its power of accomplishing the end for which it was created*. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this Court above quoted, "that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." * * *

No one will question that the interests of the great body of the people of the State, would, in this instance, be affected by the surrender of this great line of travel to a single corporation with the right to exact toll and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation." * * *

Pp. 551-2, * * * "The practice and usage of almost every State in the Union old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession on the same line of travel, the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases rail roads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated, on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which an implied contract has been contended for, and this Court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither States, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. * * * We cannot deal thus with the rights reserved to the States; and by legal in-

tendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity."

If Courts are anxious to exclude implied enlargements of such franchises in England, where a sovereign parliament is able at pleasure to resume, and is in the practice of resuming, with little care or scruple, grants supposed to have proved injurious to the public interest—how much stronger in this country must be such anxiety in the minds of those who consider the Legislature of a State, or even her people in convention, incapable of resuming or modifying the franchises without incurring a violation of the Federal Constitution. Whether there is any Constitutional difference between the Legislative resumption, for the general welfare, of such a franchise, accompanied with an adequate provision for the ascertainment and payment of a suitable indemnity to the corporation from which it is to be taken, and a law which takes for public use any other species of property with a similar provision for compensation, is not the present inquiry. Consequent upon the Constitutional restriction are practical anomalies which seem to require some remedy. If any remedy be attainable through Legislation, it is more restricted and imperfect than in England; and if no remedy be thus attainable, the reason must be in proportion stronger for a cautious interpretation of grants, the more dangerous as they may be the less revocable.

These considerations again acquire augmented force in the point in which the acts of Legislation judicially considered in the cases above cited, differ from these New Jersey acts of incorporation. The latter *expressly* confer privileges which are *exclusive*, and are *expressly* restrictive of further Legislation. That which in the Charles River Bridge case was regarded as a result to be deprecated and avoided, is therefore, in the case of the Camden and

Amboy Rail Road and Transportation Company, an ascertained—perhaps an incurable—evil. If the State of New Jersey cannot be relieved of the burden, there may be consolation in the ability of her judiciary to lighten its weight, by means which, it is trusted, have been shown to be not more appropriate than legitimate. J.

IMPRISONMENT FOR DEBT.

A laborer or person in public or private employment ought not to be imprisoned under the Act of 1842, abolishing imprisonment for debt, for refusing to give an order on his employer, for the amount of his wages or salary, to satisfy the demands of his creditors.

The 5th section of the Act of 15th April, 1845, entitled a supplement to an Act relating to executions, of June 16th, 1836, is in part as follows : “ *provided, however, that the wages of any laborer, or the salary of any person, in public or private employment, shall not be liable to attachment in the hands of the employer.*”* The 35th section of the Act of 1836, provides that in case of a debt due to the defendant, the same may be attached in the manner allowed in the case of a foreign attachment. This was the only means by which debts due to a debtor could be reached by his creditors prior to the act of 1845. The warrant of arrest prescribed in the 4th section of the act of 1842, is a legal process for the punishment of fraud, and not for the collection of money. But the act of 1845 says that the wages of laborers and the salaries of persons in public or private employment shall

*Vide *Tracy v. Bridges*, 2 Miles 352 in which it was held, before the act of 15th April 1845, that the wages of a bar keeper, which accrued to the defendant since the service of the attachment, were not liable to the attachment in execution under the act of 1836 ; and see also *Rundle v. Sheetz*, 2 Miles 330, in which it was held that the salary of an Inspector of the Customs was not liable to attachment in the hands of the Collector of the Port.—*Ed. Am. Law Jour.*

not be reached by attachment—the only legal process by which they ever could be reached. Then, as a logical, legal, common sense conclusion, they cannot be reached at all while in the hands of the employer, since the passage of the act of 1845.

But the 2nd section of the Act of 12th July, 1842, entitled an act to abolish imprisonment for debt and *to punish fraudulent debtors*, provides that it shall be lawful for a person who shall have obtained a judgment or commenced a suit in any court of record to apply to any Judge of such court for a warrant to arrest the party against whom such judgment shall have been obtained, or suit commenced. The 3rd section provides that if the complainant shall establish, by affidavit, one or more particular facts therein specified, it shall be the duty of the Judge to issue a warrant of arrest. One of the facts to be thus verified, is that the defendant has money, or evidence of debt, which he *unjustly* refuses to apply to the payment of such judgment or claim. The 8th section provides that, if the Judge is satisfied that the allegations of the complainant are substantiated, he shall commit the party arrested to jail. For what? Why, for fraud, of course! The object of this provision is set forth in the title to the act—*to punish fraudulent debtors*.

Now, suppose a laborer refuses to appropriate his wages, or that a person in public or private employment refuses to appropriate his salary to satisfy any judgment or claim that may exist against him, is he a fraudulent debtor, and liable to be imprisoned as such under the act of 1842? If so, of what use is the act of 1845? If a man may be imprisoned as a fraudulent debtor, under the act of 1842, for not giving up what the act of 1845 says the law itself shall not touch, then is the act of 1845 worse than a nullity—then is our penal code worse than that of Draco. If such be a correct construction, then are our

laws calculated to decoy honest poverty within their meshes, and crush the unsuspecting victim.

But such is not believed to be a correct construction. He who expounds the law, or administers justice, should survey all the laws in force in this Com'th as forming one body. If the provisions of different acts clash, the older must bend to the later. So far as they interfere the act of the later date, in effect, repeals the former act. Prior to the act of 1845, the wages of laborers, and the salaries of persons in public or private employment could be reached by legal process. Any attempt to evade the law, or circumvent its execution, constitutes a fraud. Hence, prior to the act of 1845, a laborer or person in public or private employment might be imprisoned as a fraudulent debtor, under the act of 1842, for refusing to appropriate his wages or his salary to satisfy a judgment or claim against him. But the act of 1845 exempts the wages of laborers and the salaries of persons in public or private employment from legal process, while in the hands of employers, and thus repeals the act of 1842, *so far as* such wages and salaries are concerned. How can it be otherwise? Under the act of 1842, no man can be imprisoned unless he is proven to be a *fraudulent* debtor. And can fraud be fastened upon him who lives up to the letter and spirit of the statute? The 26th section of the act of 1836 exempts from levy or sale, household utensils to a certain extent, all wearing apparel, four beds, one cow, two hogs, six sheep, all bibles, school books, &c. &c. The 5th section of the supplement to this act makes additional exemptions. In 1845, the wages of laborers and the salaries of persons in public or private employment, in the hands of the employer, were added to the list of exempted articles. If, then, a laborer or person in public or private employment can be imprisoned as a fraudulent debtor, for refusing to give an order on his employer for the

amount due him for his services, may not any man, with the same propriety, be imprisoned as a fraudulent debtor for refusing to give up to his creditors, his household utensils, his wearing apparel, his beds, his cow, his two hogs, his six sheep, his bibles and the school books of his family?

O. H. B.

Ebensburg, Jan. 1849.



Supreme Court of Pennsylvania.---Eastern District.

ABSTRACTS OF POINTS DECIDED IN DECEMBER, 1848,
AND JANUARY, 1849.

Reported for the American Law Journal.

BY R. C. McMURTRIE, ESQ.

DECEMBER 26, 1848.

The right to avoid an assignment, voidable by creditors for fraud, or for non-compliance with the registry act, vests in the insolvent trustees of the assignors to the exclusion of prior judgment creditors, whose executions issued subsequently to the date of the assignment to such trustees.—*Thomas v. Phillips.*

And this, though no acts in avoidance of such assignments were done by the trustees: and where it was shown they had, as individual creditors, ratified them by accepting dividends, and declared they were advised they had no right as trustees to the assigned property, and had not called on the voluntary assignees for an account. *Ib.*

Where an insolvent was discharged under the act of 1836, without having executed the assignment as required by the act, the Court subsequently allowed such an assignment to be executed and the trustees, names inserted, it was held that such trustees had the exclusive right to avoid fraudulent assignments made by the insolvent, as against a creditor levying an execution, subsequently to the perfection of the insolvent assignments. *Ib.*

Where the plff. declares on a guaranty of a sealed instrument, the seal must be proved, or there will be a variance. *Horn v. Smith.*

Evidence taken under a commission is inadmissible, unless there be a return by the commissioner showing the execution. *Ib.*

A promise to return a specific sum on demand, borrowed in Pike Co. Checks, is barred by the statute of limitations, where no demand was made within six years from the date of the promise. *Laforge v. Jayne.*

An admission of the promise, coupled with averments of a set off, and a promise to pay the balance when able, will not avoid the statute, their being no evidence of ability. *Ib.*

DEC. 30.

Where the terms of an administrator's sale of land were that the purchase money should be paid one-half cash, and the balance in one year, secured by bond and mortgage; the purchaser failing to comply is discharged if a re-sale is made on terms requiring a cash payment of the whole of the purchase money. *BANES v. GORDON.*

An order annulling a confirmation of sale, and directing a re-sale, does not rescind the contract. *Ib.*

JAN. 3.

In an action against partners, the articles of co-partnership, or dissolution, cannot be read by defts. to show their respective dates, or the firm name, without calling the subscribing witness. *TAMS v. HITNER.*

Where a subscribing witness, three weeks before inquiry for him, was shown to have been at his mother's residence, within the State, and about twenty miles distant, if inquiry for him is not made there, there is a want of due diligence to find him which will exclude proof of his signature. *Ib.*

Nor can the hand-writing of a deceased subscribing witness be proved in order to admit a deed, where there is another witness of whom no account is given. *Ib.*

The name of a firm stated in the narr. is immaterial if a joint contract be proved. *Ib.*

Partners are liable on a note given by two of them, by their name as a distinct firm, if by their course of business they induced the belief such was their firm name. *Ib.*

Where the notes of two partners composing a distinct firm, are taken for a debt of a firm of which they are also members, the onus of showing a receipt in payment is on the debtor. *Ib.*

And this, though the drawers be debtors of the firm for whose debt the notes were given. *Ib.*

Where there is a contract to erect houses for a specific sum, and it has been performed, it is not necessary to set forth the items of work, materials, &c., in the claim filed. *Young v. Lyman.*

Nor where there has been a partial performance, the completion of the contract having been dispensed with by the owners. *Ib.*

Where the contract provides that the contractor shall give security in \$500, that no liens shall be entered on the houses, a lien filed by the contractor is nevertheless valid. *Ib.*

JAN. 5.

Where a promise is made to indemnify a surety for an assignee for creditors, after the execution of the bond, there is a sufficient consideration arising from the power such surety possesses, under the act of Assembly, to compel the assignee to give additional security, or be removed. *Carman v. Noble.*

So if the promissors had received funds of assigned estate on deposit.—*Ib.*

An indemnity against debt or damage, is broken by a judgment recovered against the party indemnified. *Ib.*

Such a judgment on an assignee's bond, will be evidence against the party indemnifying, although irregular for want of a cautionary judgment required by the act of 1836, and in the *narr.* the breach was laid generally, and the bond executed after the act of 1836, pursuant to and reciting the act of 1828. *Ib.*

Where the verdict in such case was for damages, the Court below, or in Error, can enter the proper judgment for the Com'th for the penalty, and for the party suing for his damages assessed. *Ib. S. P. Scarboro v. Thornton, Jan. 8th.*

Notice to two of three joint promissors of the commencement of a suit against which they had indemnified, is notice to all, and will render a judgment recovered therein conclusive on all. *Ib.*

The record of proceedings against the assignee for creditors, is admissible in evidence against parties agreeing to indemnify the surety for such assignee.

If a surety not having paid his obligation, recovers against a party who has indemnified him, the Court will take care that the money is properly applied, if application be made for that purpose. *Ib.*

In an action by a surety to recover on an agreement to indemnify him, it is immaterial to show that satisfaction could have been had from the principal, where there has been a recovery against the surety *Ib.*

JAN. 8.

Under the plea of payment it is competent for the deft. to show what was the consideration of the note in suit, and that this had been paid since the note was given. *Hobson v Croft.*

Where it is objected that evidence is inadmissible, under the rules of Court requiring notice of the special matter, the fact that such notice was not given, should appear on the bill of exceptions. *Ib.*

Under the act of 1846, investments in mortgages and loans, made by a

corporation, created to receive deposits on which interest is allowed to the depositors, are taxable for State and county purposes. *Phil'a. Saving Fund v. Yard.*

To entitle the insured to recover for a total loss of a vessel, where the object insured continued to exist in specie, there must be an abandonment: Hence where the jury found that the cost of repairing would so far exceed the value of the vessel when repaired, that no prudent man could doubt as to the propriety of selling the vessel under the circumstances; and that the sale was made under circumstances which rendered it legal, the insured are not entitled to recover for the total loss without an abandonment. *Francia v. The American Ins. Co.*

Under such circumstances the value of the vessel when repaired is her value in the port of necessity, and not the valuation in the policy, or in the general market. *Ib.*

The protest is admissible as part of the preliminary proof, though not made within twenty-four hours after reaching a port of safety—the rule in *Fleming v. The Marine*—only excluding it in such case as evidence to the jury. *Ib.*

The master is not bound to sacrifice his deck load before deviating from stress of weather to seek a port of refuge, unless the vessel was suffering from overloading, and then query. *Ib.*

In determining the master's right to sell, it seems the rule two-thirds new for old, is not applied in ascertaining whether the vessel has been damaged to more than half her value. *Ib.*

The omission in the declaration to aver a refusal by the underwriters to pay, cannot be taken advantage of after verdict; and so of the omission that thirty days had elapsed, after proof of loss, before suit brought, where the policy provided for payment at such time. *Ib.*

Surveys when proved by the parties making them, are admissible in evidence, though made at the instance of the captain and by persons nominated by him. *Ib.*

The objection that a commission issued on a shorter notice than is required by the rules of Court, is waived by filing cross interrogatories. *Ib.*

The assignee of a mortgagee takes subject to the equities of the mortgagor, but not as to latent equities of cestuis que trust of the mortgagor or other persons. *Mott v. Clark.*

Where one holding under a secret trust had conveyed to his cestui que trust, and then mortgaged to one having notice of that conveyance, an assignee of a bona fide assignee of the mortgage, whose assignment was not registered, is not affected by the registry of the conveyance to the cestuis que trust, after the date of the first assignment, and before the second; nor is he affected with notice to the mortgagee of the trust and conveyance. *Ib.*

The assignee of a bond or other chose in action, is only liable to secret equities of the obligor or debtor. *Ib.*

Assignee of a mortgage is not bound under the recording acts, to register his mortgage. *Ib.*

If a mortgagee purchasing at a Sheriff's sale, which does not discharge his mortgage, retain the price, so much as is payable to prior liens cannot be considered as applied to the payment of his mortgage, even though six years have elapsed since the sale. *Ib.*

In ejectment by mortgagee, against third person, mortgagor is competent to prove that part of the land was included by mistake in the mortgage. *Ib.*

Though a decree is not pursuant to the prayer of the petition, yet if it was proper under the circumstances appearing on the record, and no objection was taken below on that ground, this Court will not reverse. *JOHNSON & SIMPSON'S Appl.*

Where a trustee omits entering the security required on his appointment by the Court, they may dismiss him and appoint a receiver. *Ib.*

An answer admitting a loan of part of the trust funds in personal security, authorizes a dismissal of the trustee for mismanagement, nor is it material that some of the cestuis que trust approve of the loan. *Ib.*

The decree of the Common Pleas, dismissing a trustee on his own petition, is conclusive, although the petition stated he was trustee under a will for A., when in fact he was trustee for A. for life and for her legal representatives after her death, and notice was given to A. alone, pursuant to the order of the Court, and although the trustee appointed in his stead did not enter the security required by the decree appointing him in place of the discharged trustee. *Ib.*

To avoid a decree for fraud that must be put in issue by the pleadings. *Ib.*

Sureties in a bond reciting that the Sheriff had appointed A. jailor and keeper of the prison of the county, and conditioned, inter alia, that he should keep and detain all prisoners, are liable to the Sheriff for an escape of a prisoner detained under *mesne* process: for A. is thereby created the Sheriff's deputy. *Swarboro' v. Thornton.*

Where the Sheriff obtained leave to appear and defend the original suit, and judgment was recovered on a declaration filed against the original deft: the plff. did not thereby elect to consider deft. in custody nor discharge the Sheriff. For the proceeding was wholly void except to ascertain the extent of his liability. *Ib.*

The Court may set aside a report of viewers, if they think from the evidence the road could be laid out on a lower grade than the one reported. *London Grove Rd.*

Where testator bequeathed in trust, for the separate use of his daughter

S., to be paid to her at such times as she may require, her receipt only to be a discharge, the trustee to keep the same invested so long as it remained in his hands, with a power to S. to appoint by will, "in case she should die without having withdrawn the legacy from the hands of the trustee" then over. *Held*: there was an implied power in S. to demand and receive the principal sum during the husband's life. *Chrisman v. Wagner*.

JAN. 15.

An acceptance of the provisions of a will estops a party from disputing the right of testator to dispose of property belonging to his devisees.—*Preston v. Jones*.

Testator devised part of his own land and part of that which had belonged to his wife, to his son B., and the residue of his wife's land he directed should be enjoyed by his son J., to whom he also devised other land. He also directed that in the event of J's marriage, and having children, B. should make J. a title for B's share of their mother's land. B. and J. accepted the provisions of the will. B. has thereby acquired title to so much of the wife's land as was devised to him. *Ib*.

Deposit notes taken by a mutual insurance company, from the members of the corporation, bearing interest, are taxable for county purposes as monies at interest. *Fire Ins. v. Northampton Co.*

And so of stocks in which premiums paid by the insured are invested. *Ib*.

The surplus fund of a bridge company, (incorporated,) invested in mortgages or bank stock, is taxable for State and county purposes, altho' the dividends on the stock of the company are also taxed for the same purposes. *Easton Bridge v. The County*.

One found an habitual drunkard, cannot revive a debt barred by the statute of limitations. *Hannum's Appeal*.

JAN. 16.

A foreign attachment suspends the interest on so much of the debt attached, as will be required to satisfy the plffs. demand, whether the debt be the real owner of the debt or not; if a debt is wrongfully attached, the owner has his remedy over against the plff. in the attachment. *Mackey v. Hodgson*.

Under the act of 1836, garnishees in Foreign Attachments are not entitled to any allowance for their trouble. *Ib*.

JAN. 20.

Where land was conveyed to trustees and their successors, to erect a school house for the perpetual use of the parties, to the deed and the inhabitants residing nearer to that school than any other, and such other persons as the inhabitants might see fit to admit, a charity is created which is not divested by non-user for more than seventeen years, after a school house had been erected by contribution and used, and a re-entry by the grantor. *Wright v. Linn*.

Permanency is not essential to constitute a charitable gift. *Ib*.

New Publications.

A TREATISE ON THE LAW OF EVIDENCE, by Simon Greenleaf, LL. D., Emeritus Professor of Law in Harvard University. Volume 1. Fourth Edition. Boston: Charles C. Little and James Brown. London: Stevens and Norton, 194 Fleet Street, MDCCXLVIII.

It affords us much pleasure to announce this new edition of this most excellent Treatise. When the learned Professor's first edition was given to the profession, it was reviewed, we believe by Mr. Sumner, of Boston, who thus speaks of it:

"Professor Greenleaf has taken a difficult, important, and interesting branch of our law, and treated it with originality, clearness, neatness, method, completeness, and learning. His work will be the most agreeable manual for the student, introducing him to the principles of the law of evidence, at the same time that it will engage the attention of the practitioner, and render him most essential aid in the application of the rules to the affairs of actual life. It is not necessary to say, in enhancement of its merits, that it will supersede all other works on the same subject; but we should fail in justice to the learned author, and in expressing our high opinion of his work, if we did not frankly declare, after a careful examination of it, that no other work on the subject can be of equal value to the American lawyer, and that, wherever, in our broad country, the common law is administered, Professor Greenleaf's Treatise on the Law of Evidence will be studied and referred to alike by the student and practitioner."—*Am. Jur. Vol. 27, p. 237.*

The universal voice of our profession has fully confirmed the judgment of the critic. Wherever reviewers, text writers, or jurists have had occasion to mention this book but one opinion has been expressed.—Vide 1 Duer on Ins. 170 note. Joy on Confessions. App. B. Warren's Law Studies 755. 1 Penn. Law Jour. 156. *Mentz v. Detweiler* 8 Watts & Serg. 376. Few books have met with more universal favor both at home and abroad. This new edition is not a mere reprint: there are substantial additions: the text is carefully revised and some verbal corrections made; and all the late decisions made in England, Ireland or America, are added.

We deem it not improper to notice in this connexion, a Treatise on the Law of Evidence, by John Pitt Taylor, Esq., of the Middle Temple, printed by Maxwell, in London, 1848, and to republish, without comment, the following remarks from 1 Monthly Law Reporter, pp. 136-37:

"On a careful examination of this work, it appears that the *arrangement* is borrowed from Mr. Greenleaf. This, of itself, is no inconsiderable part. So, also, are all the quotations from the Roman law. Besides these, there are many passages which are taken bodily without any acknowledgment. (Of 691 sections, which compose the first volume, 178

are copied either entirely or in substance from Mr. Greenleaf. Parts of very many others are taken from the same source. Mr. Taylor's additions consists of, 1st English statutes and rules of practice, not recognized in the United States; 2nd—some further illustrations by additional cases of the principles stated by Mr. Greenleaf; and 3rd—some few modifications of the same principles. It does not appear that he has developed any new rule of evidence. To say that Mr. Taylor's work will not be useful to the profession in England, would be to condemn Mr. Greenleaf's Treatise; for the latter is so completely reproduced in the former, that it would be difficult to accord praise to the one which is not due also to the other. The American professor may regard his English exposition as an *alter ego*. So far as we have been able to examine Mr. Taylor's additions and amplifications, we consider them as well calculated for English practitioners, although, in many respects, irrelevant in our country.

In his appropriation of Mr. Greenleaf's labors, Mr. Taylor has improved upon the example of Mr. Theobald, who, some years ago, converted Mr. Justice Story's Commentaries on Bailments into notes to an English edition of Sir William Jones' little book on that subject. Mr. Theobald's course excited some severe strictures at the time. Some hard words were used with regard to him. He was called a "literary pirate," and a law of international copy right was invoked to shield American authors from the aggressions of such lawless rovers. Mr. Theobald did not go so far as Mr. Taylor. The latter has done to an American author what he would not have ventured to do towards any English writer. The summary process of injunction would have protected the latter. Of course, in our own country, Mr. Taylor's work cannot be published or sold. But, in the absence of any law of international copy right, his course in England is open to censure only in the tribunals of criticism." 1 Month Law Rep. 135.

A LAW DICTIONARY, adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union; with References to the civil and other systems of Foreign Law. By Joseph Bouvier. Third edition, much improved and enlarged. Vol. I. Philadelphia: T. & J. W. Johnson, Law Booksellers. 1848.

We are well satisfied to see a new and greatly improved edition of this excellent and popular law dictionary. The very first edition met with many marks of favor from the profession generally.

All who know the learned author's habits of active and severe application, can bear testimony to the faithfulness and unwearied assiduity with which the irksome labor of compiling these volumes has been performed. The origin of this work is thus stated in the author's preface: "To the difficulties which the author experienced on his admission to the bar, the present publication is to be attributed. His endeavors to get forward in his profession were constantly obstructed, and his efforts for a long time frustrated, for want of that knowledge which his elder brethren of the bar seemed to possess. To find among the reports and the various treatises

tises on the law the object of his inquiry, was a difficult task; he was in a labyrinth without a guide; and much of the time which was spent in finding his way out, might, with the friendly assistance of one who was acquainted with the construction of the edifice, have been saved, and more profitably employed. He applied to law dictionaries and digests within his reach, in the hope of being directed to the source whence they derived their learning, but he was too often disappointed; they seldom pointed out the authorities where the object of his inquiry might be found." A work was much needed to remedy these defects and difficulties that must beset all students in our profession, in the commencement of their career—and such a work the judge has furnished us.

This third edition is more valuable than either of its predecessors.—Very many of the articles have been re-written and more than twelve hundred new subjects added. About one thousand were added to the second edition, and about one half the articles in that edition re-written.—Any one by a careful comparison of the several editions will trace the most marked improvements in each succeeding publication.

Under *Abbreviation*, about 1700 abbreviations are given, most of them in common use, which, without the assistance here given, would puzzle not only the student, but the practicing lawyer whose business it has been to read them during the course of his professional life. Many of those used by the civilians, have also been given, which leaves little to be desired on this subject.

There is also an index to these volumes which will greatly facilitate reference, and is a valuable improvement. We are glad to see the clumsy and not very useful Norman Dictionary left out and abandoned.

The whole book is highly satisfactory; it is equally creditable to author and publisher. The typographical execution is very good and deserves commendation. The page is larger than in former editions, and comprises more matter without encumbering the volume and giving it a clumsy look. We commend these truly useful labors of the learned Judge to our brethren of the bar as well calculated to be substantially useful.

REPORTS OF CASES argued and determined in the Supreme Court of Errors of the State of Connecticut. Prepared and published in pursuance of a Statute Law of the State. By Thomas Day. Volume V. Second edition, with Notes and References. New York: Published by Banks, Gould & Co., 144 Nassau Street, and Gould, Banks & Gould, 104 State Street, Albany. 1848.

We have already noticed the preceeding volumes of this reprint; and take great pleasure in assuring the profession that this volume is of the same character as those heretofore printed. Vide 1 Am. Law Jour. 272.

THE
AMERICAN LAW JOURNAL.

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MARCH, 1849.  
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United States District Court--In Admiralty.

STILES v. THE STEAM-BOAT JOHN STEVENS.—COLLISION.

Where a vessel is lying near to, but not moored at the wharf, and not in absolute contact with the wharf, or with vessels at the wharf, without a signal light hoisted on dark nights, and with her boom rigged out-board, she must take the consequences of a collision with another vessel moving prudently to her accustomed birth.

The libel alleged that on the first of November, 1847, the sloop was moored safely to the pier or wharf, and that about 9 o'clock in the evening, the steam-boat was observed coming down the river, the tide being at flood, that there was sufficient time and tide for the steam-boat to be kept clear of said sloop, that the sloop was lying at her moorings and could not possibly get out of the way, that there was room for the steam-boat to pass; yet the said steam-boat kept her course and ran with great force against the sloop and did the damage complained of.

The answer denied that the sloop was safely moored, and that there was room sufficient to pass in the regular and accustomed channel, and in the usual and proper
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manner of navigation, by reason of the obstruction afforded by the improper mooring or anchoring of the said sloop; and it further alleged that the said sloop had not a visible signal light as is required by law; and that her boom was rigged out-board instead of in-board, and that these were the causes of the collision, and that the improper mooring of the sloop was the sole cause of the collision.

Jno. Fallon, for Libellant. Fisher & Hazlehurst for the Respondents.

The opinion was delivered by KANE, J.

"The Steamer John Stevens, approaching her landing place on the Delaware obliquely from the channel, at night, and against the tide, with her steam shut off, and her headway nearly arrested, when within a distance considerably less than her length from the head of the wharf at which she was to come to, encountered a small vessel, which had temporarily taken a position near the wharf immediately above, while waiting for a change of tide to drop down to her berth. The boom of the schooner struck the wheel-house of the steamer, passed through the side of the cabin, and damaged it considerably. In return the boom was broken by the collision, and the schooner received other injuries. The owner of the schooner files this libel, and asks damages against the steamer."

"The schooner was not *at* the wharf, and she had no signal lamp hoisted—this is admitted on all hands, though the witnesses in speaking of her distance from the wharf, vary from five to sixty feet. She was heading against the tide, at anchor, whether otherwise fully moored or not—but either she was not moored to the wharf by a hauser from the stern, or her boom was not rigged in—one or the other—for had her stern been steadied and secured as the libellant's witnesses say it was, and had her boom been

rigged in, the steamer, moving obliquely towards the city, could not by any possibility have come in contact with the end of the boom.

"Now, without deciding whether a vessel is to be regarded as *at anchor in the stream* so as to be bound to show a light, when although in the tide way and at anchor, she is within mooring distance of a wharf, and attached to it by appropriate fasts; I have no hesitation in saying, that a vessel so placing herself, not in absolute contact with the wharf, or with the vessels at the wharf, but at some distance from it or them, must take the consequences of a collision, if she allows her boom at night so to project over her side, as to infringe against a vessel, which is moving prudently to her accustomed berth.

"The libel must therefore be dismissed; each party will bear his own costs. Libel dismissed."

Crawford Common Pleas, Case Stated, &c. Nov. 25, 1848.

ELIZA HOUSEL'S ADM'RS vs. JOSEPH HOUSEL'S ADM'RS.

In the case of a marriage prior to the act of 11th April, 1848, and the death of the husband in October following, and the wife subsequently, the personal property of the wife, remaining in specie on the premises of the husband at the time of his death, goes to his representatives, notwithstanding the act of 1848.

The plff's and def't's. intestates were husband and wife, married prior to the act to secure the rights of married women, passed 11th April, 1848, (Pamph. L. 536.) The wife, at the time and prior to the marriage, owned and possessed certain articles of personal property, goods and chattels, such as sheep, cows and household furniture. This property remained *in specie* on the premises of the husband at the time of his death, in October 1848.

The wife died subsequently. The question was, are the plff's or defts's. entitled to this property.

The opinion of the Court was delivered by CHURCH, President.

To determine this case aright, we must first determine what title to or interest in the personal property in possession of the wife at the time of marriage, does the husband acquire immediately upon and by virtue of the marriage.

The uniform language of all authority upon the subject from *Littleton* and the *Year Books*, down to the passage of the act of 11th of April last, is that all chattels personal, the property of the wife, which she has in possession at the time of marriage, in her own right, are vested immediately thereupon absolutely and entirely in the husband, and on his death go to his personal representatives, although he have no actual possession during coverture.—The marriage itself is a contract by which the woman makes an absolute and unqualified gift to the man of both her person and her personal chattels in possession, together with the right of reducing her choses in action to his possession, which when done during coverture, vests in him the entire property therein alone. Hence it is clear that when the property is so vested, the Legislature have no power to divest it, even if they attempt to do so. However, this may have been intended by the act in question, I think a careful reading of it indicates clearly that the language and terms used makes it prospective in its operation entirely, if not as to the marriage it clearly is with regard to the time the woman acquires the property. Any other construction would seem to be a direct violation of the *Bill of Rights*.

Judgment must be entered for defendants upon this case stated.

Derrickson for plffts., Finney for defts.

In First Judicial District of Pennsylvania.—Phil'a.

**PIERCE BUTLER, LIBELLANT, vs. FRANCES ANN BUTLER,
RESPONDENT.**

1. A respondent who denies the material allegations in a libel for Divorce, and claims in writing a trial by jury, has a right to such trial.
2. The "reasonable cause" which will justify wife or husband in quitting and abandoning each other is that, and only that which would entitle the party so separating him or herself to a divorce.
3. The cruelty, within the Pennsylvania Statute, which entitles a wife to a divorce from her husband, is actual personal violence, or the reasonable apprehension of it; or such a course of treatment as endangers her LIFE OR HEALTH, and renders co-habitation unsafe.

The opinion of the Court was delivered by KING, President.*

The libellant in his libel, which is in the brief and sententious form peculiar to our practice, sets forth that his wife, the respondent, did, in violation of her matrimonial obligations, on the 11th of September, 1845, wilfully, maliciously, and without reasonable cause, desert and absent herself from him, and his habitation, and since that time has continuously persisted in such desertion and absence. It concludes with a prayer for the divorce from the bond of matrimony, given by the act of Assembly to the injured party, under such circumstances. To this libel, the respondent, Frances Ann Butler, has answered—in which answer she first denies that on the 11th day of September, 1845, or at any other time before or since, she had wilfully and maliciously deserted and absented herself from the libellant and his habitation. She then

*The opinion of the Court contains all the facts necessary for a correct understanding of the principles decided; but to those who desire more, we would say that the *Libel*, the *Answer*, *Narrative* of domestic troubles, and the *Correspondence* between the parties will be found in detail in the Home Journal for Dec. 16th, 1846.

proceeds to state, that it was true, and that she therefore admits, that she did leave and absent herself from the habitation of the libellant on the 10th day of September, 1845, and that she has ever since remained so absent.— But she denies such leaving and absence to have been desertion. First: Because for a long time previous, the libellant had separated himself from her as a husband, and because of his wrongful and unlawful conduct towards her while in his habitation, which would have justified her in quitting it without incurring the legal consequences of desertion. Second: Because she had the assent and license of the libellant, so to quit his habitation and absent herself from it, and his subsequent approval and acquiescence therein; and also, because his conduct to her for a long space of time before she so quitted and absented herself, was designed and calculated, and such as to force her therefrom. Third: Because she would have been justified in so absenting herself without such license, approval, acquiescence, or design, by the libellant's cruel treatment of her, and by such personal indignities offered by him to her as rendered her condition intolerable and life burdensome. She then "craves leave to submit" what she terms a "narrative in support of these allegations," which "narrative," with its subjoined exhibits, occupies near sixty printed pages. At the conclusion of this narrative, she asks that her cause may be tried by a jury, on an issue or issues, to be framed for that purpose; a right given to her by act of Assembly.

Independent of this historical sketch of matrimonial discords, the answer, like the libel, would have been in perfect concord with our simple, facile and convenient practice in the administration of the Divorce Laws. It would have been the brief, but clear and precise assignment of causes, why the respondent had quitted and absented herself from the common habitation, and the ne-

gation, that such quitting and absence was a wilful and malicious abandonment of her marriage duties. The parties would thus have reached a complete issue, and the cause, according to our practice, been ripe for a hearing, either before the Court, if a jury trial had not been asked, or before a jury, if such a claim had been interposed.

Previous, however, to proceeding to trial, the libellant would have had the right to demand, and receive of the respondent, a written specification of the acts of cruelty, or other circumstances, by which she proposed supporting her general allegations; with the times, places, and circumstances of their occurrence, as far as these could be reasonably and practically given. The giving of such notice would not have made the facts contained in it evidence of course in the cause. On the trial, all such matters as should have been deemed inadmissible on the ground of irrelevancy or inadequacy, could have been objected to when offered, and would have been admitted or rejected by the Judge who presided at the trial, according as he considered the objections taken valid or otherwise.

Why this course has not been pursued—this regular, usual and orderly course, arises from the useless introduction of Mrs. Butler's "narrative" into the answer, which the libellant seeks to treat as if it were a responsive allegation, in an English Ecclesiastical Court. In these Courts, facts intended to be relied upon by parties to divorce cases, are stated in the pleadings at length; broken, however, into separate portions, technically termed *Articles*; in which the facts are alleged under separate heads, according to the subject matter, or the order of time, in which they have occurred. Before such articles are admitted to proof, it is competent to the adverse party to object to their admission, either in whole or in part; in the *whole*, when the facts altogether, if taken to be

true, will not entitle the party propounding the articles to the demand which he makes, or to support the defence which he sets up ; in *part*, if any of the facts pleaded are irrelevant to the matter in issue, or could not be proved, by admissible evidence, or are incapable of proof.

These objections are made and discussed before the Ecclesiastical Judge, who admits an article to proof, or rejects it, according as he may be of opinion, that it exhibits a legal cause of complaint, or proposes to offer legal proof of such a legal cause, or otherwise. If the parties state candidly the facts capable of proof, they can thus take the opinion of the Judge, in the first instance, whether in such a case as the one proposed to be proved, the party complaining has any legal remedy for his supposed wrong ; or whether the testimony by which he proposes establishing it, is relevant or adequate for that purpose.

From the decision of the Ecclesiastical Judge, admitting or refusing proof of an article, an appeal lies to a higher tribunal. The libellant, as has been observed treating the "narrative" introduced into the answer as a responsive allegation in an Ecclesiastical Court, has replied to it, *first*, by what he terms an "additional allegation with objections to the defendant's answer and allegation : " *second*, by "responsive and additional allegations as to part of the defendant's allegations ; and *third*, by "objections to the defendant's allegations ;" which counter pleading occupies twenty-seven pages of the printed paper book. This, with the sixty pages of the answer, makes a pretty formidable exhibition of Ecclesiastical Pleading, which it is, however, *possible*, might be admissible in those Courts. But we are in a Pennsylvania Court of Law, administering a Pennsylvania Statute, the course of procedure under which, has been familiarly known throughout the Commonwealth, for a long series

of years. If we should agree with the libellant, and treat the respondent's "narrative" as a regular Ecclesiastical Responsive allegation; if we should reject it, or order its reformation, by directing it to be sub-divided into articles: or, if dispensing with that form, we should arrange the respondent's alleged facts ourselves, and proceed to consider and decide upon their relevancy, their adequacy, or their legal capability of proof, we of course fall at once into the practice of the English Ecclesiastical Courts; and as there cannot be two systems of procedure under the same law, we abolish our own. Where this change would end, how the Supreme Court would be able to revise ~~our~~ proceedings, whether, if our judgment in a given case rejecting an article, should be reversed, that Court would take proof of such rejected article, or order the case back to this Court, with directions, are questions which might be multiplied, in order to show the difficulties that would arise from such a radical change in our practice as that proposed in this case. If any thing was wanting to convince us of the total inexpediency of changing our simple and convenient system, for the voluminous and expensive one of Doctors Commons, the record before us would furnish a crying evidence of it. If any would be benefitted by the change, which we doubt, it certainly would not be the good people of this Commonwealth, whose truest interests are best subserved by laws plainly and intelligibly expressed, administered through forms simple, facile and inexpensive. If articulated and detailed facts are requisite in an answer, they must be equally so in the libel, and such is actually the Ecclesiastical Practice. Of consequence, by such a system, the volume of the proceedings must be immensely extended, the expenses enhanced, determinations delayed, and relief made practically inaccessible to those for whose protection laws are specially framed: the feeble, the poor, and the oppressed.

In her denial of the wilful and malicious desertion charged against her in the libel: in assigning the libellant's license and cruelty as justificatory reasons for her departure from the common habitation, the respondent did all she was required to do, in order to demand that this fact should be tried by jury. If specially called upon before such trial for precise statements of the facts intended to be relied upon by her, to sustain her answer, and which the libellant may regard as too generally charged therein, she is bound to furnish them. All the matter, however, introduced into the answer in the shape of a "narrative" is pure surplussage;—a statement of facts, some of which would and some of which would not be received in evidence on the trial. It is therefore not the subject of exception, either as to its form or substance. Being extraneous to the formal record, it must be stricken from it. The exceptions of course fall with it. The case is thus brought back to its true and simple elements, and made to assimilate its features to the hundreds of other analogous causes which occupy the Courts of the Commonwealth. The libel will then charge against the respondent, a wilful and malicious desertion, without reasonable cause, of her husband and his habitation, persisted in for two years. The answer will deny such wilful and malicious desertion, and assert that an admitted quitting of, and absence from, the common habitation, by the respondent, was licensed by the express assent of the libellant, or justified by law from *reasonable* causes supervening, viz: unkind treatment and cruelty on the part of the husband. The issues between the parties under our practice will be thus completely formed, and ripe for trial by jury. On the trial, the jury must decide whether such abandonment of the common domicil was with the previous license and assent, or subsequent approbation and approval of the husband; or if the respondent fails in establishing this

position, whether the unkind treatment and cruelty of the husband towards her was of that character which formed a reasonable cause for her departure.

In thus determining that the cause has been submitted to us, in a manner which does not regularly raise the questions of fact, so elaborately discussed, we are not to be understood as in the slightest degree expressing any opinion on the merits of the controversy. When the case has been submitted to a jury; when the facts on both sides have been fully heard, the time will have arrived for such an expression of opinion. *Before*, such expression would be certainly premature, and might be grossly unjust. Indeed, it scarcely could be otherwise than unjust, because it would be formed on a one-sided view of the subject.

Here this judgment might close; but as several legal propositions have been discussed before us, which of necessity must arise on the trial of the jury issue, it is proper we should express our opinions in regard to them, as rules for the future conducting of the cause.

The first of the propositions is this :—Suppose the evidence to establish that the Respondent left her husband's habitation with his license and assent, or continued her absence with his subsequent acquiescence and approval, what would be the legal effect of either on the libellant's cause? Although no Court determining on the marriage relation, recognizes such consent-separations, as arrangements strictly legal; yet, when it is clearly shown that the withdrawal of a wife or husband from mutual co-habitation has been the result of *such* an understanding or agreement; or where the withdrawal of one has received the subsequent approbation of the other, the continuity of absence under such circumstances is not a "wilful and malicious desertion." The malice of the desertion arises from its being the perverse act of the one, in refusing the

performance of the matrimonial obligations and duties, which the other has the legal right to require. But when such separation has been the result of mutual arrangements, and these clearly established in proof, then each is in equal fault in this particular, and neither can claim a legal right against the other, in consequence of an act, in which he or she has been an equal participant. Such assent or acquiescence, however, are revocable acts.

And if either party persists in a state of separation after such revocation, he or she thenceforth occupies the position of a party quitting co-habitation on his or her own motion. In the celebrated case of the *Earl of Westmeath vs. The Countess of Westmeath*, 2 Haggard's Rep. Supplement, a previous separation by formal articles was considered as not in any way affecting the legal relation between the parties, so as to prevent a decree for the restitution of conjugal rights. As a deed of separation upon mutual agreement on account of differences, though containing a covenant not to bring a suit for restitution of conjugal rights, such articles are held to offer no impediment to such a suit. To this effect are also the cases of *Smith vs. Smith*, and *Fletcher vs. Fletcher*, cited in *Westmeath vs. Westmeath*. But so long as the consent on which the original absence was founded, or continued in, is not withdrawn, a continuity of the absence is not desertion within our act of Assembly. Of course, if either party has the legal right to separate from the other, for causes which lawfully justify such separation, and subsequently a consent-separation takes place between them; a withdrawal of that consent by the aggressor, will leave the party aggrieved in no worse position than that originally occupied. A refusal to renew co-habitation, would be justified or otherwise, according to the state of things which preceded the separation.

The next question agitated involves the construction

of the clause in the act of Assembly which defines desertion. This is said to take place "where either party shall have committed wilful and malicious desertion, and absence from the habitation of the other, without reasonable cause, for and during the space and term of two years." What is meant by the phrase "*reasonable cause*?" On the one hand it is insisted that reasonable cause means such a cause as would have enabled the absenting party to have obtained a divorce, if instead of quitting co-habitation, the latter had assumed a more active position and asked for a divorce. On the other, it is argued, the reasonable causes of this law are not definable by any precise rule, but are such causes as in any case submitted will satisfy a court or jury that the separation was a justifiable act.

In every point of view in which this question can be examined, it is one of grave magnitude. Too liberal a construction given to the words 'reasonable cause' could not fail to invite to separations between husband and wife, which otherwise never might occur. While a construction too limited might subject the party most meriting legal protection, because most needing it, to hardships and suffering which are revolting to the feelings of every right minded man. But when the solution of questions of this embarrassing nature are presented to public functionaries, charged with the maintenance and conservation of social morality, they always should be considered with reference to this fundamental truth :—That laws, framed for the government of the whole people, must look to the good of the whole ; and that we should be satisfied with their operation when it best promotes the *general* moral order of civil society, even though in a particular case it may produce apparent hardships. That the general moral order is best promoted by discountenancing matrimonial separations, unless for weighty and substantial causes, is

undisputed and indisputable ; at the same time the public weal is thus best served ; the true interest of the immediate parties, the happiness and respectability of their common offspring, the feeling of those united to them by the ties of kindred and affection, are most effectually advanced and protected. Controversies easily settled in the domestic forum, when it is known that the law expects of married persons mutual concessions, forbearance, and even submission to great wrongs, often would, under a different legal system, end in disastrous and permanent separations, disgraceful to the parties, distressing to their children, and humiliating to their friends. "When," says a great Judge, "people understand that they must live together, except for a few reasons known to the law, they learn to soften by mutual accommodation the yoke which they know they cannot shake off ; they become good husbands and good wives, from the necessity of remaining husbands and wives ; for necessity is a powerful master in teaching the duties it imposes."

From this course of reflection we are led to adopt the doctrine, that the reasonable cause which will justify wife or husband in quitting and abandoning each other, is that, and only that, which would entitle the party so separating him or herself to a divorce. This is the doctrine of the English Ecclesiastical Courts, which, long under the presidency of the finest minds of that country, are rich sources from which we may extract principles, however we may differ in the mode of applying them. When in that country co-habitation is suspended by husband or wife, by his or her own authority merely, *without a sufficient reason* for the act, the aggrieved party is entitled to the aid of the Ecclesiastical Courts, in enforcing a restoration of the duties of mutual co-habitation. This remedy is technically called a restitution of conjugal rights. In its application it has ever been held, that nothing can be offered

in bar to the wife's return to her husband, except such facts as would entitle her to a divorce in case she had brought a suit against him for a separation. *Holmes vs. Holmes*, 2 Lee Reports 116; *Oliver vs. Oliver*, 1 Haggard, 361; Consistory Reports; *Dysart vs. Dysart*, 1 Robertson's Ecc. Report 106; (Coote's Practice in Ecc. Courts, 367.) These cases decide a principal precisely analogous to that which we have adopted. A principle practical in itself, and appreciable by every one to whom it is stated; a principle as well supported by authority as recommended by sound morality.

The opposite doctrine, by creating no standard by which a proposed reasonable cause is to be measured, leaves that to the arbitrament of the judge, or the jury in each case as it arises. Of course under such a system, or such absence of all system, decisions would vary with the varying temperaments, characters, and education of men. To-day it would be decided that a given state of facts affords reasonable cause for a wife quitting her husband; to-morrow, the same facts before another tribunal, would be held not to be reasonable cause for a husband quitting his wife. Thus would the obligation of a contract in the maintenance of which, in full vigor and integrity, society is most deeply interested, be left in a state of the most intolerable vagueness and uncertainty. Such a system would not fail to invite adventurers in this judicial lottery. But the opposite doctrine, instead of inviting separations for light and frivolous causes, will render them unwise and inexpedient, because, they *may* compromise but never *can* advantage the guilty party. The practical working of such a doctrine argues most cogently against its soundness. It would continually present the spectacle of the abandonment of marital duties by one party, for causes confessedly inadequate to entitle him or her to a divorce; and yet so far recognized by the law,

as to exempt the party quitting co-habitation from any legal liabilities consequent on the act. It would be throwing back such parties on society, in the undefined and dangerous position of a wife without a husband, and a husband without a wife. It would maintain the marriage contract in force, and yet afford no means of enforcing its obligation in cases where it would be admitted that no adequate cause existed for its dissolution. The rule therefore, that repudiates such quasi dissolution of the matrimonial union, by the act of either husband or wife, is the rule alike of sound law, right reason, and social morality.

The remaining subject of examination is the construction of that clause of the act of Assembly which gives a divorce to a wife "when the husband shall have by cruel and barbarous treatment, endangered his wife's life, or offered such indignities to her person as to render her condition intolerable and life burdensome, and thereby forced her to withdraw from his house and family."—What is meant here by "cruel and barbarous treatment endangering life?"—"indignities to the person, rendering the condition intolerable, and life burdensome?" Do they mean the positive infliction of personal sufferings, or the threat of them; or, do they embrace those wounds of the spirit, which rudeness, austerity, petulance, or ill temper can inflict?

How far the idea of marital cruelty may be safely carried, considered with regard to its adequacy to the legal separation of husband and wife, has been a subject much considered by jurists of all civilized nations. All have felt that it ought to be viewed as a practical question, affecting the most interesting of social relations, and one not to be determined rashly or impulsively. The difficulty of defining the exact line, between that which is legal cruelty, adequate to separate judicially husband and wife, and those painful domestic broils which courts cannot re-

gard as sufficiently serious for such intervention, has always been admitted. *Sir William Scott*, in his great judgment in *Evans vs. Evans*, 1 Haggard Cons. Rep. 35, "declines the task of laying down a direct definition of cruelty," contenting himself with what he terms negative descriptions, which, though they show what is not cruelty, he considers "perhaps the safest definitions which can be given, under the infinite variety of possible cases, that may come before the Court." Premising that it is the duty and inclination of Courts to keep the rule extremely strict, he declares "that the causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger, no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and obligation; but *what falls short of this is with great caution to be admitted.*"

In enumerating these negative descriptions of cruelty, inadequate to justify a sentence of divorce, he declares that "what merely wounds the mental feelings is in *few cases* to be admitted, where they are not accompanied by bodily injury threatened or menaced." That "mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, *if they do not threaten bodily harm*, do not amount to legal cruelty." That it was "still less cruelty, where it wounds not the natural feelings, but the acquired feelings, arising from particular rank and situation; for the Court had no scale of sensibilities by which it could gauge the quantum of injury done and felt; and therefore though the Court would not absolutely exclude considerations of that sort, where they are stated as matters of aggravation, yet they cannot constitute

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cruelty where it would not have otherwise existed." In a summary of principles in the same cause he declares that he had "heard no case cited in which the Court had granted a divorce without proof given of a *reasonable apprehension* of bodily hurt; apprehension being enough; for the Court was not to wait till the hurt was actually done—but the apprehension must be reasonable, not an apprehension arising merely from an exquisite and diseased sensibility of mind." In *Oliver vs. Oliver*, 1 Haggard Const. Reports 361, he declares "that words of *mere present* irritation, however reproachful, will not enable the Court to pronounce a sentence of separation.—Words of menace, importing the *actual danger of bodily harm*, will justify its interposition." In *Holden vs. Holden*, 1 Haggard Const. Reports 453, he says "*every thing* is in legal construction *cruelty* which *tends to bodily harm*, and in that manner renders co-habitation unsafe; wherever there is *tendency* only to bodily mischief, it is a peril against which the wife must be protected; because it is unsafe for her to continue in the discharge of her conjugal duties." In *Harris vs. Harris*, 1 *Phillimore* 111, he says that "it is not the habit of the Court to interfere in mere domestic quarrels; there must be something which makes co-habitation unsafe." In *Waring vs. Waring*, 2 *Phillimore* 132, he asserts the "definition of legal cruelty is that which *may endanger the life or health* of the party." In this case he adds to his previous enumeration of negative descriptions of cruelty, the charge against the husband of forbidding to his wife any intercourse with her own family. "For," says he, "although it might be a harsh exercise of the husband's authority, yet he might be justified in denying such intercourse; that although a woman might be amiable, her connexions might not be so; that there might be many reasons to justify a husband in denying such intercourse; and that though it might be

harsh, it would be going too far for the Court to interfere." Although in the view of this true founder of the modern English law of divorce, for the cause of cruelty, causes which involve the life or health of the sufferer, are essential to justify the intervention of the Court, he cautiously avoids saying, that these results can in the eye of the law *only* flow from actual personal violence or the threat of it.

In selecting causes of ordinary occurrence, which he repudiates as inadequate to constitute legal cruelty, he leaves himself uncommitted as to the "infinite variety of possible cases which might come before the Court" under this head. In rejecting "what merely wounds the mental feelings" he confines himself to that which is 'not accompanied with bodily injury either actual or menaced.' In pronouncing that "mere austerity of temper, rudeness of manner, a want of civil attention and accommodation, and even occasional sallies of passion," are in themselves insufficient causes, he speaks of those which do not "threaten bodily harm." When in *Holden vs. Holden*, he describes as legal cruelty "*every* thing which *tends* to bodily harm, and in that manner renders co-habitation unsafe," he does not limit the otherwise generality of this language by an imprudent attempt at defining what would be such, under all possible circumstances. And when in *Waring vs. Waring* he apparently departs from the cautious path he had previously marked out for himself, and attempts to define affirmatively legal cruelty, he does so in language sufficiently broad to leave his former positions unshaken. It is to be *that* which "*may endanger the life or health of the party.*" In *Westmeath vs. Westmeath*, Sir Christopher Robinson, observing on the past cases, says in his conclusion from them all, "that the Ecclesiastical Courts have hitherto been uniformly strict in requiring *proof of actual injury or of real apprehension of*

injury, as it may affect the *safety or health* of the person, to justify divorce on the ground of cruelty." But still we do not understand this Judge as saying that personal or threatened personal violence, are the only facts which could afford the evidence necessary to establish this state of things in any and every case.

In *Neild vs. Neild*, 4 Haggard, Consistory Reports 265, Dr. Lushington, the presiding Judge, held, that "the *main test* to be applied to the consideration of the libel was whether all the facts, assuming them to be true, with which Mr. Neild was charged, were of a nature and description to *satisfy* his mind that co-habitation could no longer subsist between the parties without personal danger to Lady Caroline Neild." "Where," said he "a strong conviction exists in the mind of the Court that the personal safety of the wife is in jeopardy, or where even it may see reasonable ground to apprehend such a consequence, it is its bounden duty to protect the wife from such risk and danger." It is true that to this principle, which is in harmony with the previous doctrines of Sir William Scott, he adds: "that in these suits the species of facts most generally adduced are:—First, personal ill treatment which is of different kinds—such as blows or injury of any kind. Secondly, threats of such a description as would reasonably excite in a mind of ordinary firmness, a fear of personal injury. For causes less stringent than these, the Court has no power to interfere and separate husband and wife."

In *Dysart vs. Dysart*, 1 Robertson's Ecclesiastical Reports, 106, the same Judge decided against the wife, apparently applying these principles. But in the same case (page 111) he holds that the refusal by a husband, to furnish a wife with "necessaries and comforts" within his pecuniary means, and suitable to the wife's education and habitudes, was an act of legal cruelty. He very correctly

confines himself to "necessaries and comforts," not luxuries and enjoyments. And holds that as to everything beyond "necessaries and comforts," the husband, so far as the law is concerned, is the sole Judge; that no human tribunal has authority to interfere, and none could interfere with real benefit to the public interest.

The judgment in *Dysart vs. Dysart* came before the *Court of Arches* on an appeal; when it was reversed by *Sir H. Jenner Fust*, and the Countess of Dysart held to have established an adequate cause of divorce. The Judge, after stating the general doctrine, previously laid down by *Sir William Scott* in *Evans vs. Evans*, that "mere austerity of temper, petulance of manner, rudeness of language, even occasional sallies of passion, *if they do not* threaten bodily harm, do not amount to legal cruelty," says:—"From this I deduce this inference; if austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, occasional sallies of passion, do threaten bodily harm, they amount to legal cruelty." (See *London Jurist*, March 1848, page 492.)

The general doctrine of the English Ecclesiastical Courts, with regard to the divorce for the cause of cruelty, has received the approbation of the most eminent jurists, and the most learned Courts of the Union. In *NEW YORK*, it was recognized and adopted by *Chancellor KENT* in *Barriere vs. Barriere*, 4 *Johnson's Chancery Reports* 189, and by *Chancellor WALWORTH* in *Perry vs. Perry* 2 *Paige's Chancery Reports* 502; by the Supreme Court of Connecticut in *Shaw vs. Shaw*, 17 *Connecticut Reports* 189; by the Supreme Court of *Kentucky* in *Finley vs. Finley*, 9 *Dana's Reports*; and by the *Supreme Court* of *Massachusetts* in *Warren vs. Warren*, 3 *Massachusetts Reports* 321.

Divorces, or rather separations for cruelty, were proceedings familiar to the Courts of Continental Europe,

and were regulated by principles similar, though not as stringent as those of the English Canonical Code. The system under the code of the old French Monarchy before the Revolution, is treated of by the learned Pothier in his "*Traite du Contrat du Marriage*," Partie 6 Chapitre 3, page 269." "The separation of habitation," says this writer, "is the relief which, for just causes, is accorded by the Judge to one of the parties, from the obligation of living with the other, and performing conjugal duties: without, however, severing the marriage tie." Discussing the principles on which this law should be administered, he says: "The union of husband and wife, which is formed by God, does not permit to a woman to demand the separation of habitation, if it is not *for very great causes*." What are just causes he admits is not easy to determine; but holds they are to be left to the arbitrament and prudence of the Judge. Proceeding to enumerate what causes have been held sufficient, he *first* refers to cases of bad treatment, where the husband has struck or attempted to strike his wife; these being the most ordinary causes of separation. *Second*, to cases of bad treatment which had not gone to this extent. As an example of this kind adequate to authorize a divorce, he gives the case of the wife of a public officer.

The husband, he says, had never struck his wife or offered to strike her; but from the first year of their marriage, and during all those which followed, he never ceased to testify towards her the greatest contempt; on all occasions, before persons who frequented his house, before the domestics, and even before their children, whom the father excited to ridicule their mother. *Third*, cases of the refusal by the husband, through inhumanity towards his wife, to furnish to her in a state of infirmity the necessaries of life, although he had the means to do so. *Fourth*, the accusation of a capital crime prosecuted calumniously against his wife by the husband.

The modern French Code of divorce approximates very nearly to our own. The absolute divorce, among other causes, is given by the Code Napoleon for "violence, ill usage, or grievous insults of one of the spouses towards the other." The words of the code are "*Les excès, sévices ou graves injures, de l'un époux envers l'autre.*" These words, like those of our own statute, are somewhat vague and general. But the French tribunals have assigned to them definite meanings. "Les excès" are said by *Poullier* (*Le Droit Civil Français*, vol. 2, p. 41) to be acts of violence which exceed all measure, and may put the life of the spouse in danger. "Les sévices" are acts of cruelty which do not put the life in danger. "Injures graves," such insults as tend to destroy the reputation of the outraged spouse, that attack her probity, her morals; and that *harsh words will not suffice.*

These citations are of value in showing the practical construction given by an enlightened nation to a code analogous to our own. And so far are useful aids in the construction of kindred enactments.

Aided thus by the lights derived from foreign and domestic jurisprudence, we approach the construction of our own Statute with less diffidence. And that construction, in our opinion, is this:—That the cruelty, within our Statute, which entitles a wife to a divorce from her husband, is actual personal violence or the reasonable apprehension of it; or such a course of treatment as endangers her life or health and renders co-habitation unsafe. The latter may exist without the former. The denial of "necessaries and comforts" by a husband to his wife, he having the means to furnish them, would certainly endanger her life and health, though done in the blindest way. Of course, "luxuries and enjoyments" are different things from "necessaries and comforts" within the compass of the husband's means. What luxuries and elegant enjoy-

ments a husband shall extend to his wife, are matters referable to his own generosity and liberality, with which no Court can interfere on any rational or practical principle. The case of *Dysart vs. Dysart*, 1 Robertson 111, shows this to be the present doctrine of the English Canon Law Courts, and was that of the French Code a century ago as we have shown by Pothier.

Again, a husband may, by a course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied by violence, positive or threatened. Would the wife have no remedy in such circumstances under our divorce laws, because actual or threatened personal violence formed no element in such cruelty? The answer to this question seems free from difficulty, when the subject is considered with reference to the principles on which the divorce for cruelty are predicated. The Courts intervene to dissolve the marriage bond under this head, for the conservation of the life or health of the wife, endangered by the treatment of the husband. The cruelty is judged from its effects; not solely from the means by which those effects are produced. To hold absolutely that if a husband avoids positive or threatened personal violence, the wife has no legal protection against any means short of these, which he may resort to, and which may destroy her life or health, is to invite such a system of infliction by the indemnity given the wrong doer.

The more rational application of the doctrine of cruelty is to consider a course of marital unkindness, with reference to the effect it must necessarily produce on the life or health of the wife; and if it has been such as to affect or injure either, to regard it as true legal cruelty. This doctrine seems to have been in the view of *Sir H.*

Jenner Fust, in *Dysart vs. Dysart*, when he states he deduces as an inference from what Sir William Scott ruled in *Evans vs. Evans*, that "if austerity of temper, petulance of manner, rudeness of language, a want of civil attention, occasional sallies of passion, *do threaten bodily harm, they do amount to legal cruelty.*" This idea expressed axiomatically would be no less than the assertion of this principle. That whatever form marital ill treatment assumes, if a continuity of it involves the life or health of the wife, it is legal cruelty. The principle of *Dysart vs. Dysart* is not only important, as being the most recent expression of opinion on this subject in a high Ecclesiastical Court, but because the principle on which that cause is placed is considered by the Judge as a just and necessary deduction from those settled by Sir William Scott in the earlier cases.

If these views are well founded, there is no real difference between our opinions on the question of legal cruelty and those of the English Canon Law Courts as *now* understood and administered. But were it otherwise, we should still with all becoming deference to these high authorities, adhere to our own convictions. In limiting our intervention in matrimonial causes, in which cruelty is charged, to cases in which life or health are in any way involved, we occupy safe and prudent ground. A case of this kind would present a different state of things from one of matrimonial discord produced by mere acerbity of temper, or rigidity of domestic discipline. In such cases Courts have most wisely refused to interfere, referring the parties to their domestic forums for the adjustment of their differences, and recommending to the aggressor the improvement of his manners, and to the aggrieved, the remedies of decent resistance or prudent conciliation.—The discrimination of mere domestic discords, from the species of malicious cruelty, on which we have perhaps

too long commented, can readily be made by any tribunal to whom a trust of such magnitude is confided.

It was ingeniously argued by the respondent's counsel, that the words "indignities to the person," in our statute were words equivalent to *personal indignities*, and that therefore acts which could be classed under that category, were acts for which a divorce could be granted under our law. If this argument is sound, then undoubtedly personal insults and reproachful language would be causes of divorce, because they rank among the grossest personal indignities. This construction, it will be perceived, would introduce into our code as a cause of divorce the "injures graves" of the code Napoleon: for to this exactly would the result of such a construction arrive.

It is quite certain that our law does not, in terms, make this one of the causes for the dissolution of the marriage bond; and it seems to us clear that no just principle would authorize the Courts to do so under the pretext of construction. The words "shall offer such indignities to her person," are the equivalents of the offered or threatened violence of the English Canon Law, or the "*sevices*" of the Code Napoleon, and do not embrace the causes of "injures graves"—grievous insults. The English Canon Laws, like our own, have always refused to regard mere personal insults as adequate causes for the separation of husband and wife; regarding such a doctrine as tending too greatly to relax a social bond, which, from before the time of *Tacitus*, the *Saxon Race* have considered a sacred institution. "When," says the Roman historian, speaking of the manners of the German, "the bride has fixed her choice, her hopes of matrimony are closed for life. With one husband as with one life, one mind, one body, every woman is satisfied; in him her happiness is centered; her desires go no farther; and the principle is not only an affection for her husband's person, but a reverence for the marriage state."

The Court have thus noticed all the points by them deemed material in the cause. Its future course will be that indicated, viz :—trial by jury on the bill and answer.

Hon. George M. Dallas and J. Cadwalader, Esq., for Libellant. Wm. M. Meredith, Esq., and Hon. Rufus Choate, of Mass., for Respondent.

A. W. & J. H. FOSTER, PROPRIETORS OF THE DAILY PITTSBURG
DISPATCH, vs. CHAMBERS M'KIBBEN, POST-MASTER
AT PITTSBURG, PA.

In the District Court of Allegheny County.

This was a special action on the case, for damages arising from the wilful refusal of the defendant to advertise the "list of letters," in said paper, he knowing it to have the largest circulation in said city, as required by law.

Argued, on demurrer, on Saturday, February 3, by Hon. Walter Forward and Andrew Burke, Esq., for plaintiffs, and Wilson M'Candless, Esq., for defence.

The opinion of the Court was delivered by LOWRIE, Assistant Judge, as follows :

The purpose of advertising uncalled for letters, is to give notice to the persons to whom they are addressed, that they may come and get them, and the regulation is for their benefit. If it should result in any benefit to the publishers of newspapers, this is incidental merely, and is not at all within the design of the act. It is provided that the advertisements shall be inserted in the newspaper having the largest circulation; but this is for the benefit of the receivers of letters, that they may more certainly have notice of them; and in no sense as a patronage of newspaper publishers, by the general govern-

ment, or as a rule for the distribution of such patronage. The repeal of the law, requiring advertisements, would be no injury to newspaper publishers, though it certainly would be to the public. The receivers of letters might possibly be injured by a breach of the act, and might therefore have a remedy. But surely none but those intended to be benefitted by the act can claim any benefit from it. It was not passed to cure any grievance of theirs, and they cannot be aggrieved by its infraction.—The duty enjoined is no duty owed to them. They might make profit by its performance; but, they sustain no loss by its non-performance. Every man is bound to have the deeds of his land recorded; but this is not a duty owed to the recorder of deeds, and he can sustain no action for its omission. The cause of action is claimed to arise from the statute by implication, but there can be no implication of a right of action, on a statute, in any person, where there is no implication of a benefit intended him by the statute.

And so is the law laid down in the very decisions which one would expect to hear cited in such cases:—"Where an act prohibits or commands the doing of a thing for the advantage of any person, *such* person, if injured by disobedience to that law, is entitled to an action, though the statute does not give one"—19 Vin. Ab. 518, 523, 6 Mod. 25, Ibid 53, 1 Salk. 19. Or, "where an act prohibits or enjoins any thing, *the party grieved* by a breach of it, shall have his action upon the statute"—2 Inst. 55, 486. 10 Co. 75, b. 3 Black. 115.

But here is an official duty depending entirely on a statute. In the first instance, I infer, the Post-master is left to the largest legal discretion in his decision, and may act upon presumptions and reputation, as to the fact. But in case of question or dispute, then he shall receive evidence and decide the fact. When the fact is decided,

the next duty is plain. Until the fact is decided the right to the advertising exists in no one. The Post-master alone has the power to hear and decide that question. He can have no supervisor over him. In the performance of that duty he acts as judge, and is responsible to no State authority for the manner or result of his judgment. Even if done corruptly and maliciously, no common law injury arises. It is a breach of an official statutory duty by an officer of the general government, involving no invasion of common law rights, and is therefore a duty not enforceable here.

The plaintiffs declare for a breach of duty in refusing them the advertising ; but they show no right to it.— They cannot show it, but by the decision of the Post-master, that their paper has the largest circulation. They do not aver that he has decided this fact. If he refused to decide it, *this* is the breach of duty which he has committed, and *hence* is the injury, if any. But the declaration is not for this. He may be compelled to perform this duty, and then, the one consequent upon it ; but not by this court, nor in this form of proceeding.

It may be that the plaintiffs are entitled to have it decided that they have the largest circulation, and therefore, that they are entitled to the advertising. But this decision leaves that question to the judgment of the defendant's proper official superiors. And I do not think that the State Courts ought to have any jurisdiction over officers of the United States, to enforce such a duty. It might be found difficult to obey so many masters. A direct *mandamus* to perform this duty, we could not issue ; and this is very like to an indirect one. If the statute had imposed a penalty for this breach of duty, we could have had no jurisdiction—17 Johns. R. 4. So also is the law, if the remedy were by indictment.

Judgment for defendant on the demurrer.

COMMONWEALTH *v.* WILLIAM BECHTOL.*In Quarter Sessions of Centre County, August Term, 1848.*

MOTION IN ARREST OF JUDGMENT.

1. An indictment erroneously entitled "April Sessions, 1848," but actually found at "August Sessions, 1848," charging an offence committed in "July, 1848," may be amended by the records of the Court.

2. An indictment under the act of 29th March, 1824, charging that the defendant "did employ W. F., and other persons to the jurors unknown, to cut down or fell seventy-five pine timber trees, he, the defendant, knowing that the lands &c., did not belong to him or to any person by whom he was authorized," &c., is defective.

3. Such indictment should aver that the trees were *actually* cut by the persons employed to do so—should *name the owner* of the land, or show that he was unknown, and should not state the offence *disjunctively*.

4. An indictment under the act of 1st April, 1840, for knowingly receiving timber, &c., cut contrary to the act of 1824, must allege substantially that the offence prohibited by the act of 1824 has been committed, and then charge the defendant with knowingly receiving the timber, &c., so cut down and felled.

The opinion of the Court was delivered by **WOODWARD**, President.

There are two counts in this indictment. The first was framed upon the act of the 29th March, 1824, entitled an act to prevent the destruction of timber, &c., (see *Purdon's Digest*, 1117,) and the second on the supplement to that act passed the 1st of April, 1840. *Purdon* 1118. The indictment was found by the Grand Jury at the August Sessions of 1848. The first count charges the offence to have been committed on the first day of July, 1848, and the second count charges the offence therein set forth, to have been committed on the fifth day of July, 1848, but the indictment at the head of it, is entitled "April Sessions, A. D. 1848," and it is now urged, after conviction in arrest of judgment, that the offences are laid to have been committed *since* the indictment was found. This objection cannot prevail. The caption is

no part of the indictment itself,—it is only a copy of the style of the court at which the indictment was found.—Chitty's Criminal Law, p. 326. And it becomes material only on removal of the record by certiorari into the Supreme Court, where it would be amendable according to the facts appearing of record in this Court. Addison R. 174-80. The offences being charged in the body of the indictment on days before, according to our records, the bill was found, there is no ground furnished by the erroneous date of the caption for arresting the judgment.

Other objections to this indictment have been taken, however, which seem to be better founded. The first count charges that William Bechtol, the defendant, "did employ William Fye, and other persons to the jurors aforesaid unknown, to cut down or fell seventy-five pine timber trees, he the said William Bechtol then and there well knowing the lands on which the said trees were growing did not belong to him or to any person by whom he was authorized, contrary to the form of the act," &c. It is not alleged that either Bechtol or Fye did cut down or fell the trees, but only that Bechtol "*employed*" Fye to cut them. This is the precise offence charged, and the whole of it. It might possibly be inferred from the phrase, that Fye had cut down the trees at the instance of Bechtol, but in indictments the *corpus delicti* is not to be left to possible inferences—it is to be plainly and directly charged. But it is insisted that the charge is laid in the very words of the act of Assembly, and that the offence consists in *employing* a person to commit the misdemeanor, whether he commit it or not. The act is entitled an act to prevent the destruction of timber. It enacts "that if any person or persons shall cut down or fell or employ any person or persons to cut down or fell any timber tree or trees, knowing the same to be growing upon the lands of another person, without the consent of

the owner or owners thereof, the person or persons so cutting or causing the same to be cut by any other person or persons, every such person so offending shall be deemed guilty of and may be presented for a misdemeanor." "So offending"—how? What is the offence? Why, clearly the cutting down another man's timber trees or causing them to be cut down. This was the offence created by the statute. The destruction and stealing of timber were intended to be prevented by the Legislature, and they meant to make the man as guilty of a misdemeanor who employed another to take it, as he who took it himself. But there must be a *cutting down* to complete the statutory offence. It was not a conspiracy to cut another man's timber trees that the Legislature meant to punish, but the actual cutting.

The construction contended for on the part of the Commonwealth, would give the statute more scope than it has ever been supposed to have. If a *contract* between two men, never executed, to cut timber trees, be within the statute, it is indeed a most comprehensive penal law, but that such a contract is not, is sufficiently clear from the title of the act, and the first section, whilst the third section, which makes the trespasser liable to the owner for "double the value of such tree or trees so cut down or felled," demonstrates that the offence to be punished consists in *cutting down* the trees, rather than in the *agreement* to cut them. There is, therefore, no charge of the statutory offence in the first count of this indictment.

The second count charges that Bechtol "did purchase or receive a large quantity of shingles, to wit: (ten thousand shingles,) and other timber, to wit: (shingle bolts, and shingle cuts, sufficient to make ten thousand shingles,) he the said William Bechtol then and there well knowing that the said shingles and other timber so as aforesaid described, had been cut or removed from the lands of

another person, without the consent of the owner or owners thereof, contrary to the form of the act of Assembly" &c. The act of the 1st April, 1840, under which this count of the indictment is prosecuted, is supplementary to the act of 29th March, 1824, and provides that "all and singular the penalties and provisions of the three first sections of the act (of 1824,) shall be and they are hereby made applicable to any person or persons who shall purchase or receive any timber tree or trees, knowing the same to have been cut or removed from the lands of another person, without the consent of the owner or owners thereof, or who shall purchase or receive any plank, boards, staves, shingles or other lumber made from such timber tree or trees, so as aforesaid cut or removed, knowing the same to have been so made." This count is defective in many respects, and not such as will justify us in entering up judgment on the verdict. In the first place, I suppose it to be necessary, in a count or indictment founded on the act of 1840, to allege substantially, the offence to have been committed, which is prohibited by the act of 1824, and then to charge the defendant with purchasing and receiving the timber or lumber made from the trees so cut down and felled. An indictment for receiving stolen goods always alleges a larceny. It charges that the defendant feloniously and fraudulently did have and receive goods then lately before feloniously stolen, taken and carried away, the said defendant then and there knowing the said goods to have been feloniously stolen and carried away. So here, the indictment should allege the cutting or felling of timber trees growing on the land of other persons, than those cutting or causing them to be cut, and then charge the receiving of them, or the lumber or shingles made from them, knowing them to have been so cut and felled. The

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act of 1840 is supplementary to that of 1824, and was intended to visit the penalties of the latter act on the small trader who is usually found in the neighborhood of "timber stealers," ready to become the *innocent* receiver of the ill acquired gains of the more enterprising marauder,—and, to justify such a visitation, it is necessary to allege that the offence for which those penalties are provided, has been committed, and that, knowing this, he has received the plunder. We have already seen that the first count fails to charge the offence created by the statute of 1824, and the second is equally deficient. The *scienter* alleged in the second count is not an allegation of the fact, but of the *knowledge* of the fact. The fact itself, to wit, the cutting down of timber trees, is not charged in either count. And it is a general rule, says Mr. Chitty, that where the act is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists. Chitty's Crim. Law, vol. 1 p. 229.

In the next place it is a general rule in indictments, that the name of the owner or person injured should be mentioned. Mr. Chitty says it is absolutely necessary to insert it where it is known, p. 213. If indictments for timber cutting are to conform to the general rule, it would seem to be necessary to name the owner of the land on which the timber trees were cut, and if not known, it could be alleged as it is in indictments for larceny, where the ownership of the goods is unknown. The notion that the name of the owner of the lands need not be inserted in the indictment, sprung from the 11th section of the act of the 8th April, 1833, (see Purdon's Digest, p. 701,) where it is provided that it "shall be sufficient to convict the offender (under the act of 1824,) that he knew the lands on which the said tree or trees were growing did not belong to him, or to any person by whom he was au-

thorized." Difficulties had been experienced in bringing home to defendants a knowledge of the ownership of the lands on which they trespassed, and hence the *rule of evidence* as prescribed by the act of 1833. But it is a rule of evidence only—not of indictments. I am not prepared to say that an indictment under the act of 1824, would be fatally defective for want of an allegation of the ownership of the land ; but where it is well known, as it was in this case, it ought to be inserted, and then the act of 1833 will excuse the want of proof that defendant knew it. But if it should be thought that the act of 1833 changes the form of indictments under the act of 1824, it does not affect indictments or counts under the act of 1840, and it is upon this act the second count of this indictment stands. Here, then, to indictments upon the act of 1840, the common law rule in regard to the name of the party injured would seem to apply, and if applicable, this count is defective in its silence on this point.

In one other point this count is defective. "Another general rule relative to the mode of stating the offence is, that it must not be stated in the *disjunctive*, so as to leave it uncertain what is really intended to be relied on as the accusation. Chitty's C. L. 236. And where a statute on which an indictment is founded enumerates the offences, or the intent necessary to constitute such offences *disjunctively*, the indictment must charge them *conjunctively*, as where the statute against unlawful shooting in Virginia, &c., affixes a penalty when the act is done with intent to maim, disfigure, disable or kill, the indictment should charge the intent conjunctively. See Wharton's Crim. Law, p. 81. This must be regarded as a modification of the well settled general rule that in indictments for an offence created by statute, it is sufficient to describe the offence in the words of the statute. The words of the statute may safely enough be followed ; but if

words descriptive of the offence are disjunctively connected in the statute, they should be conjunctively united in the indictment. In a word, the "or" of the statute should be changed to the "and" of the indictment. In disregard of this rule, Bechtol is charged in the count under consideration with "purchasing or receiving" timber and shingles which had been "cut or removed" from the lands of others.

It is possible that criticisms so minute as these ought not to prevail to the arresting of judgment in a case of misdemeanor for cutting timber trees, and I should be less inclined to give them effect if there was the *substance* of the statutory offence contained in this count. If it alleged a cutting and removing of timber trees from the land of Mr. Gratz by Fye, and others unknown, and that Bechtol purchased and received the same, knowing them to have been so cut and removed, it would be a good indictment. It would be an easy matter to overlook informalities in the pursuit of substantial justice; but here the substance of the offence is not charged, and we cannot therefore impose the prescribed penalty.

The judgment is arrested.

Petriken & Curtin for Commonwealth. Burnside for defendant.

Supreme Court of Tennessee--At Knoxville.

SEPTEMBER TERM, 1848.

Reported for the Knoxville Tribune, by O. P. Temple and R. H. Armstrong, Esqrs.

JAMES KELLY v. JAMES CRAIG.

This was an action of slander commenced in Greene county. The slanderous words as charged were, in substance, that Craig had charged Kelly with stealing six

hundred dollars of his money while they were in the State of Alabama together. The jury found a verdict in favor of Craig, the defendant.

TURLEY, J., delivered the opinion.

Judgment is sought to be arrested on the ground that the verdict is contradictory and inconsistent. There is, it is true, an apparent inconsistency in the verdict, but it is not such an inconsistency as vitiates it. It arises out of the double pleading allowed by our statute; under which the defendant pleaded:—1. That he was not guilty of speaking the slanderous words. 2. That he was not guilty of speaking them within six months. 3. That he was justified in speaking them. Upon all these pleas there were issues, and the jury found them all for the defendant. Now, the finding of either of the issues for the defendant, would have warranted a judgment for him, and shall the finding of all of them for him, place him in a worse condition than if one had been found for him, and the others against him? Surely not. If the jury had found a part in favor of the defendant, which could not stand in connection with a part found for the plaintiff, or if they had found two facts contradictory to each other, then the verdict would be inconsistent and a nullity, because there would be nothing upon which judgment could be given. But such is not this case, for though it be true, in accurate expression, that words which have not been spoken, cannot be said to have been truly spoken; yet it is equally true, that it may be said that words which have not been spoken, if they had been would have been truly spoken. This is the light in which this finding is to be understood. The defendant relies upon the defence that he never spoke the words, but for greater precaution extends his ground so as to embrace his case, provided he had spoken them, and they were true. The plaintiff replies, you did speak them, and they are not true. The

defendant proves that he did not speak them, and that they are true if he had spoken them, and the jury so find. This is no contradictory verdict.

If the judgment were arrested and a new trial awarded, upon what issue would it be had? Neither of the inconsistent pleas, not guilty and justification, can be stricken out; and both must be submitted again to a jury, who may find as before. The proof would warrant it, and there is no way of preventing such a finding. The fact that two such inconsistent pleas may be submitted to a jury at the same time, warrants a verdict upon both of them, and prohibits an arrest of judgment therefor.

Judgment of the circuit court *affirmed*,

Supreme Court of Ohio.

Reported by H. Griswold.

DECEMBER 27th, 1848.

Lake Thayer v. James Brooks.—Error. Ashtabula.—Birchard, C. J., held: 1. That suit may be maintained in Ohio, to recover damages for an injury to property in Ohio, occasioned by the diversion of water, though the act which occasioned the diversion may have been committed in Pennsylvania. 2. That the rule of damages in an action for a nuisance, is the injury actually sustained. 3. Whether an action will lie for draining a swamp, for the purpose of cultivation, and thereby diminishing the volume of water which had previously run past, and supplied a mill with water: quere.

DECEMBER 28, 1848.

Francis Henry, et. al. v. The Vermillion & Ashland Rail

Road Company.—Huron. Avery, J., held: 1. That a bill in Chancery in the form of a creditor's bill will lie against the stockholders of an incorporated company to subject unpaid subscriptions of stock. 2. That the stockholders may be proceeded against in this way, though they omitted to pay at the time of subscription the five per cent. required by the charter. 3. That an agreement attempting to secure to any stockholder the privilege of paying up subscriptions in store goods or otherwise, except in money, will be treated as a fraud upon other stockholders, and payment in money enforced.

James Frazer v. John Fulcher.—Certiorari. Washington. Hitchcock, J., held: 'That a man sentenced to imprisonment for life, in punishment for a crime, is not civilly dead, and letters of administration cannot be granted on his estate. Judgment reversed.

Alexander M'Laughlin v. John Russell. Error. Columbiana. Birchard, C. J., held: 1. That where a person has admitted that he was the author of a libel in a certain newspaper, any other newspaper of the same impression may be read to the jury, and is not secondary evidence. 2. That in actions of libel, witnesses who know the parties and circumstances, may be called to state their opinion and judgment, as to the person intended, where the libel is ambiguous. Judgment affirmed,

Supreme Court of Pennsylvania, Eastern District, Phila.

ABSTRACTS OF DECISIONS.

JANUARY 22, 1849.

The transfer of a ship, before delivery of the cargo, passes the right to sue for the freight, and the law implies a promise to pay by the consignee receiving the goods. *Pelayo v. Fox*.

Where one of the executors settled a separate account prior to the act of 1834, showing a balance in his hands, the next of kin may sue for his share of the undisposed surplus, since that act, though the co-executor was then living. *Richardson v. Richardson*.

A settlement in the Orphans' Court of a distribution account is not necessary before the common law action can be maintained, nor is a discharge from a citation to settle such an account a bar to the action. *Ib.*

In such action there being no account of the disposition of the funds, or proof as to the receipt of interest, the Court directed the jury to charge interest on the balance of the administration account up to the time when the first legacy was due. After deducting that, to charge interest up to the maturity of the second legacy and so on, and the judgment was affirmed, (the legacies in this case always exceeded the amount of the interest.) *Ib.*

Where an administration account was settled in 1818, an action by next of kin brought in 1844, is not barred by lapse of time, where all the legacies were not paid or payable until 1827. *Ib.*

JAN. 26.

The party by whose orders a house is erected is the first builder, and liable for the value of the party wall, although the house was erected under a contract for a gross sum "including party walls" and which had been paid. *Davids v. Harris*.

An execution issued by a justice and returned levied, but not sold for want of time; an alias stayed and a pluries issued nine years afterwards returned no goods, is evidence for defendant of payment of the debt. *Ib.*

The right to compensation for a party wall is personal to the first builder; hence where a house was erected on land conveyed to husband and wife, and the heirs of the wife, the husband and his creditors are entitled to the compensation. *Ib.*

By proceeding before arbitrators an objection to the illegality of their appointment is waived even if there was an express agreement there should be no waiver. *Christman v. Moran*.

The rule in *Walton v. Shelly* does not apply where the note or bill is not sued on. Hence in an action to recover from a prior endorser the amount advanced to take up the bill, the drawer and acceptor are not incompetent under the policy of the law to prove that the bill was endorsed for the accommodation of the party making such advance. *Wright v. Fuehl.*

Where funds are deposited for a special purpose, with notice to the receiver, he cannot refuse to apply them to the object for which they were deposited, on the ground that a debt is due him by the depositor. *Bank of U. S. v. Macalester,*

The State of Illinois created two separate funds for internal improvements; the one for general purposes, the other for the construction of a particular canal. The canal was under the superintendence of the Canal Commissioners, and a loan was authorized and negotiated on bonds bearing interest, payable at A. B. and P. The funds of the canal commissioners were deposited with the B. U. S. at P. The fund commissioners of Illinois also opened an account which was overdrawn. Held, that the B. U. S., having notice of the creation and issue of such bonds, coupons entitling to receive the interest to accrue thereon at the B. U. S. and receiving on deposit funds sufficient to pay such coupons, under an agreement to pay them, could not refuse payment on the ground of a debt due by the State on the fund commissioners' account. *Ib.*

Assumpsit against a depositor for the amount of an over-draft, is a waiver of the tort, and subject to the general right of set off. *Ib.*

The holder of coupons payable to bearer, may maintain an action thereon against the party bound to pay such coupons, or use them as a set off against him, there being no proof that they were unlawfully obtained. *Ib.*

JAN. 29.

A. having purchased the right of a vendee, under articles, erected fixtures on the land which he afterwards sold to B. to whom he also transferred his interest in the land by parol. B. cannot set up as defence to a claim for the price of the fixtures, a judgment against A's vendor which was entered after possession taken by A, under his agreement, which judgment was known to B. at the time of his purchase of the fixtures, for 1st., it was no lien because the interest had then been transferred to A., and if a lien, B. might have severed before execution; and 2nd, he bargained for the fixtures as personalty with knowledge of the existence of the judgment. *Ross' Appeal.*

Under the act of 1843. (to prevent preferences in assignments,) non releasing creditors are not entitled to dividends under an assignment in trust for such creditors as shall release. *Lea's Appeal.*

JAN. 31.

On an appeal taken from a decree of the Orphans' Court, dismissing an executor for waste and mismanagement of the estate, that Court may require security from the appellant, not only that he will prosecute his appeal with effect and pay costs, but for the faithful performance of his duties pending the appeal—which operates as a supercedas. The amount of the security is in the discretion of the Court. *Com. v. The Judges of the Orphans' Court of Philadelphia.*

FEB. 2.

A promise of a reward to a constable for arresting a criminal under a warrant which he is bound by law to execute, is without consideration.—*Smith v. Whildin.*

The death of the person elected to fill the office of clerk of the Orphan's Court, before he has qualified himself according to law, does not create a vacancy in the office, which the Governor may fill by appointment—but the incumbent who is authorized to hold the office until his successor is duly qualified holds over. *Com'th ex. rel. v. Hanley.*

Under the general issue without notice of the special matter, deft. may prove that the work was done in an unworkmanlike and insufficient manner. *Gaw v. Wolcott.*

An order to pay when in funds, drawn by consignor or his consignee, in favor of a third person, with the name of the consignee written on the face of the order, coupled with evidence from which a promise to pay can be deduced, entitles the payee to sue the drawee. *Gillespie v. Mather.*

But such promise is to be construed according to the writing, and hence where the drawer was previously indebted to the drawee, and the latter had accepted bills drawn by the former, prior to the acceptance of the order, he can deduct such debts and liabilities from the funds applicable to the order. *Ib.*

The record of an action by the payee against the drawer of a bill, which avers that on presentment the drawee answered there were no funds in his hands, and that the bill was protested, does not estopp the payee from averring in an action against the drawee that there were funds in his hands to pay the order. *Ib.*

The register having granted letters of administration of the estate of a feme covert to a stranger, the register at the instance of the husband revoked them and granted letters to the husband; on appeal the register's court revoked the letters to the husband; on appeal, the S. C. reversed the decree of the court, and affirmed the decree of the register—Rogers, J., saying the act is imperative and the title to the property will be subsequently determined. It was said in this case that the property was not a separate use. *Brittain's Appral.*

FEB. 6.

A tenant from quarter to quarter, who has held over, is not bound to give notice of his intention to quit at the end of the current quarter.—*Cooke v. Nielson*.

FEB. 7.

Though the objects of a charity are uncertain, a devise will not fail for want of a trustee capable of taking, if a discretionary power is vested any where. And such power may be vested in an unincorporated religious society. *Pickering v. Stratwell*.

A devise of real and personal estate to the monthly meeting of Friends of Philadelphia, for the Northern District, (being an unincorporated religious association,) to be applied as a fund for the distribution of good books among poor people in the back part of Pennsylvania, or to the support of an institution or free school in or near Philadelphia; established against the heirs and representatives of testator on a bill filed by certain members of the meeting on behalf of themselves and other members. *Ib*.

FEB. 8.

An order to quash a for : att: is not the subject of a writ of error, for the affidavits on which the order is made are not part of the record, and in the absence of error apparent on the record, and where an order is made on extrinsic evidence, the presumption is in a Court of Error, that all things were rightly done. *Brown v. Ridgway*.

FEB. 9.

A. conveyed lands to a trustee in trust to apply the rents and profits to the interest accruing on certain incumbrances, and the residue of said income to A. for life, and in case he should leave a widow that the trustee out of the said balance or net revenue income and proceeds of the said yearly rents, pay said widow an annuity of \$1000 yearly during widowhood, which should be in lieu of dower, &c., and the residue of said rents and profits to third persons. A. died and the rents and profits during certain years were insufficient to pay the interest on the incumbrances and the annuity. The widow is entitled to the arrearages out of the rents accruing during subsequent years. *Rudolph's Appeal*.

In an action against the county for the destruction of property by a mob, the plaintiff may prove his ownership and the value of wearing apparel destroyed, but he is incompetent to prove the destruction of household furniture, &c. *County v. Leidy*.

The objection taken being general, he was rightly admitted if competent for any purpose. *Ib*.

FEB. 12.

Devise of a house to my wife for life, the remainder of my property to my wife, one part to each child, one part to my mother-in-law to live in

the house with my wife and children, or if she prefers it to receive in lieu thereof \$200. The widow by the acceptance of the devise becomes contingently liable for the charge, and her estate is thereby enlarged into a fee simple. There being personal estate on which the bequest of the remainder can operate. *Coane v. Parmentier*.

Defendant objected to plaintiff being selected as arbitrator, saying "he is not an honest man :—" Held not actionable, for it was not spoken of him in his trade, nor as an arbitrator, for he never was chosen. *Wright v. Ewing*.

FEB. 16.

Where books are produced at the trial under an order, under the act of Assembly, and the Court grant leave to the party applying for the production to inspect them during an adjournment of the Court, the injury is collateral to the cause and irremediable; hence, this Court will not reverse on that account. *Beals v. Lee*.

Under the pleas of non assumpsit or of payment, the defendant without notice of special matter may show that the plaintiff has credited him in his account for goods sold to plaintiff, thereby balancing the account. *Ib.*

Money had and received will not lie for the value of goods sold which were to be paid for in merchandize. *Ib.*

An executed contract by a merchant for the purchase of goods before the day from which the inquest finds him to have been non compos, cannot be avoided by proof of insanity at the time of the purchase, unless there has been a fraud committed on him by the vendor, or he has knowledge of his condition. *Ib.*

Plaintiff having obtained a judgment before an Alderman, appealed to the C. P. and then discontinued the appeal. No action lies on the judgment before the Alderman for the discontinuance in such case is a disclaimer. *Fellon v. Weyman*,

FEB. 19.

Testator bequeathed an annuity to his executors to be paid to the widow of his deceased son during all the term of her natural life, if she so long remain his widow and unmarried, with a general devise over of the residue of his estate—the devise over being a condition in restraint of marriage is absolute and the condition void. *Hoopes v. Dundas*.

A limitation over on marriage of the devisee is valid. *Ib.*

A tenant who has quit possession and received notice to give security for the rent within five days, must tender such security before the proceedings are commenced before the justices under the act of 1825; a tender afterwards is immaterial. *Ward v. Wandell*.

" Unless the conditions of the act relating to limited partnerships are

strictly complied with, the partners are generally liable. Hence, where such a partnership was formed, consisting of the general and one special partner, and the firm name was a company, the special partner is generally liable. *Andrews v. Schott*.

Where a third person enters the firm as a general partner, the special partnership is dissolved, and if there be a renewal and not a new cash payment by the former, and continuing special partner, but the cash paid into the former special partnership remains with the new firm and constitutes the cash paid into the new firm by the special partner, he becomes a general partner of the renewed firm. *Ib.*

In such cases knowledge by creditors of the existence of the special partnership agreement at the time the contracts are made, does not discharge the special partner from his general liability. *Ib.*

An allegation of such knowledge in the creditors, and that they trusted to the credit of the firm and general partners, and not to the special partner, in an affidavit of defence, does not amount to an averment of a special contract which will discharge the special partner from a general liability to such creditors. *Ib.*

FEB. 19.

Testator devised to his son H. for life remainder to his issue, and if he died without issue to his seventeen grand children, or such of them as should be living at the death of his son, and the issue of such as were then dead, he then gave specific property to or in trust for each of his said grand children, and declared that if either of them died before him or in their minority and without issue, their share of testator's estate should go to the brothers and sisters of such decedent named in his will, and that such of his real estate as should become the property of his grand daughters, should be held in trust for them by trustees thereafter named. By a codicil reciting the devise to his son H. and his death he declared that the said estates should go to the survivors of the seventeen grand children, their heirs and assigns, the same as if H. had outlived him and died without issue. One of the grand children named in the devise, even after the death of H. died after the date of the codicil in the life time of testator without issue, leaving collateral heirs: Held that the estates devised to H. for life, passed under the will and codicil to the grand children living at testator's death,—2d, that the shares of the grand daughters were vested in the trustees appointed for them by testator in the body of his will. *Goddard v. Goddard*.

The Case of James Sullivan.—It seems that Sullivan, the vanquished prize-fighter, is in danger of imprisonment under a former conviction of manslaughter for which he was under sentence, in the Penitentiary in New York, when Gov. Bouck granted him a pardon in 1843, on condition *inter alia*, that he “will not engage in any prize-fight, so called, during his natural life; and in the event of his not complying with the said conditions, or either of them, then this pardon shall cease and be inoperative, and the said James Sullivan shall be arrested and imprisoned according to his sentence.” In England, the King may pardon on condition, and in this country the President has the same power, 7 Bacon 412, 7 Peters’ Rep. 161; opinions of Atty. Genl., vol. 1, 250, vol. 2, 1034. So in Pennsylvania, 8 W. & S. 197, and in New York, 2 Caines 57; in the latter State, the question was largely discussed in the *People v. Potter*, N. Y. Legal Obs. May 1846, p. 177, 1 Kent 283, *note*. The pardon of Sullivan was granted under the old constitution. In the constitution of 1846 the power is expressly given to the Governor to “grant reprieves, commutations and pardons after conviction for all offences except treason, and cases of impeachment, upon such conditions, and with such restrictions and limitations as he may think proper, subject to such regulation as may be provided by law relative to the manner of applying for pardons.” An idea is entertained, by some, that the condition only restrains the recipient of the pardon from prize-fighting *within the limits of the State of New York!*

Thomas Hyer’s Case.—We perceive, by the report of a decision of Judge Parsons, that the victor in the late dis-

graceful prize-fight has been arrested in Philadelphia and surrendered to the authorities of Maryland, as a fugitive from justice. It seems that the ancient form of Governor's warrant, although heretofore held to be insufficient by reason of its not showing the case to be within the act of Congress, is still in use. Judge Parsons very properly pursued the same course in relation to it that was adopted in the case of Henry Thomas, who was surrendered to the authorities of Ohio, and executed for the murder of Frederick Edwards, in Ross county, Ohio. In cases of this kind the Governor has no authority, *merely as Governor*. In that capacity the Courts being co-ordinate branches of government, are not bound to obey his mandate. Per Bell, President, 2 Pa. Law Journal 150.— But the Governor may be regarded as an *agent of the General Government, quo ad hoc*, deriving his authority from the act of Congress, and to entitle his warrant to obedience, under the paramount authority of the act of Congress, it should show that the pre-requisites of the act have been complied with, or should be accompanied with the necessary proof by affidavit duly certified, or by a copy of an indictment found, showing that the person arrested has been charged with crime, &c. See case of Henry Thomas, Lewis' Crim. Law, 262.

Miscellaneous Notices.

A letter, received from the Judge reported to have made the decision referred to in a late, number p. 323, authorises us to say that he has been misunderstood, and that no such decision was made by him.

An interesting decision reported to have been made by Judge Knox, in a prosecution under the seduction law of 1843, is received. To guard against misapprehending the points decided, the President Judge is requested to favor us with his own report of the case.

The Rhode Island case, as it has been called, has been disposed of in the Supreme Court of the United States without involving an inquiry into the original question between the Dorr Constitution and the Old Charter. That question it was held was a *political* question which must be settled by *political tribunals* and when so settled, it was the duty of the Court to take the decision of these tribunals for their guide. It was also held that in this case, the political authorities having decided in favor of the Old Charter, the Court must sustain it.

☞ The interesting opinion of Judge KINE, in the celebrated case of *Butler v. Butler*, has crowded out many other articles intended for this number, among which are notices of the following new and valuable publications :—

4 Denio's Reports of the Supreme Court of New York, published by Gould, Banks & Co., N. Y.

1 Sanford's Reports of the Superior Court of the City of New York, by Banks, Gould & Co., N. Y.

14 Vol. New Library of Law and Equity, by M'Kinley & Leasure, Harrisburg.

1st volume of the Annual United States Digest, by Little & Brown, Boston.

REPORTS OF CASES argued and determined in the English Court of Chancery, with Notes and References to both English and American Decisions. By John A. Dunlap, Counsellor at Law. Vol. XXX.—Containing Hare's Chancery Reports, vol. 4, 1844, 1845, 1846—7, 8 and 9, Victoria. New York: Published by Banks, Gould & Co., Law Book sellers, No. 144 Nassau Street; and by Gould, Banks & Gould, No. 104 State Street, Albany. 1847.

This book is similar to those of this series that have gone before it. It is a reprint of an excellent English Chancery Volume, containing the decisions of some of the very best Equity lawyers of modern times. Lord Lyndhurst, Lord Langdale, Sir Lancelot Shadwell, Sir Knight Bruce, and Sir James Wigram. It covers a period of time from Easter Term 1844 to Easter Term 1846. The cases themselves are valuable and important, and the decisions are well considered and carefully reported. The notes of Mr. Dunlap give additional value to the American reprint.

THE
AMERICAN LAW JOURNAL.

APRIL, 1849.

Supreme Court of New York--Oneida Circuit.

WEARE v. SLOCUM.

1. An agent to conduct a suit in a Court of Record is an Attorney-at-Law.
2. Where A., who was not an Attorney, signed a summons "B. (the plaintiff's name) by A. agent," and required the answer to be served on "me," at a place where A. resided, but which was not the residence of B.

Held: That the proceeding was irregular. 1st. Because A. was not an Attorney, and 2nd, because the summons required the answer to be served at A's residence, instead of the residence of the plaintiff. Where by setting aside a summons and complaint as irregular, the plaintiff would be barred of his right of action, by reason of the Statute of Limitations, the Court, instead of setting the proceeding aside, will permit an amendment to be made on payment of costs.

Motion to set aside the service of a summons and complaint under the following state of facts: The summons and complaint were served on the defendant on the 27th day of December, 1848. These papers were signed "*Archibald Weare, by J. G. Cramer, agent.*" And the summons required the answer to be served in the following words, viz: "*On me, at Russia Corners, Herkimer county.*" It appeared that the plaintiff did not reside at Rus-

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sia Corners, but that Cramer, the agent, did reside there ; and it further appeared that he was not an Attorney of the Court.

J. BENEDICT, *for the motion.*

J. G. CRAMER, *opposed.*

GRIDLEY, J.—*At Chambers.*—This is an attempt on the part of a person, who has not been admitted as an attorney, to practise as such, under the name of agent. If this can be done, then the law which requires a regular admission to authorize a person to practise becomes a dead letter. There is a large class of persons, who would hold themselves out as qualified to conduct the most important legal controversies, and would mislead the weak and credulous to their ruin, were it not for the protection of the law, which requires as an indispensable condition of the right to practise, an order of the Court, founded on satisfactory evidence of a good moral character, and of sufficient learning and ability.

It is no answer to say that many incompetent and immoral persons are admitted ; and therefore, that a regular admission to practise is not a reliable test, either of character or capacity.

It is true that the Courts are liable to be imposed upon in relation to the character of the applicant, and it is quite probable that they have often been too indulgent or too careless in admitting applicants, destitute of the necessary qualifications to conduct suits with reasonable safety to the interests of their clients. This, however, only proves the necessity of a stricter administration of the rule, but furnishes no argument in favor of its repeal, nor any justification for its violation while it exists.

Again, the summons required the answer to be served on either the *agent*, or the *plaintiff*, at Russia Corners. If by this was meant the *agent*, as is probable from the fact that he resided there, it is apparent from what has been said, that there is no law to authorize such a service.

An agent to conduct a suit in a Court of *Record* is an

attorney at law, but Mr. Cramer was not an attorney, and could not regularly act as such. But if the service was intended to be required to be made on the *plaintiff*, as is now argued, then the direction was false and inoperative, for the reason that the plaintiff did not reside at Russia Corners. (See the 107th section of the Code.) *The defendant is therefore* entitled to have the motion granted.

But it is suggested that the statute of limitations will have run against the demand before another suit can be commenced, and I am for that reason asked to allow the plaintiff to amend, and I do so, upon the payment of \$10 costs. It is true that no costs can legally be allowed to the moving party as costs of the motion. But it has been held that such costs may be awarded by the Court, as the *terms*, or as the *condition* of the relief granted to a party who is adjudged to be in default. There is, however, another ground on which the great injustice of denying costs to the moving party (however meritorious the motion and whatever the fraud of the adverse party may have been, which rendered it necessary) may be avoided, and that is, by regarding the party as moving himself, to be relieved against the consequence of his own irregularity. For instance, where a defendant moves to set aside a writ for some defect, which is amendable, the mover is entitled to have the writ set aside. But inasmuch as the irregularity *is* amendable, and leave to amend would be granted on a direct motion for that object on equitable terms, the Court will regard the irregular party as moving to *amend* (without a formal motion,) and will allow the amendment on the terms of paying costs to the moving party. So here, the plaintiff must pay costs as a condition of being allowed to amend, just as though he had made a formal motion upon notice for such relief.

NOTE.—In connexion with this case it may be stated that at the December circuit, for Wayne county, Mr. Justice Sill refused to be bound by the decision of Edwards J., *Devries v. M'Koan*, 1 Code Rep., p. 6, and admitted a party not an attorney to appear for another in a cause on producing an appointment in writing, and a certificate of moral character.—Code Rep. 105.

District Court of the United States--In Admiralty.**FLANNERY vs. THE ONTARIO. PHILADELPHIA, DEC. 1848.****"COLLISION."**

Under what circumstances in case of collision a steam tow may be to blame in spreading itself too widely over the channel.

Fish and Hazlehurst, for Libellant. W. G. Smith for Respondent.

KANE J. The Steamer Rappahannock was descending the Schuylkill on the 12th of June last, having a number of canal boats in tow. Three of these were attached on each side of her guards, and four others were towed astern. The steamer with her ten boats occupied a space of 168 feet in length, by 128 feet in breadth. The wind and tide were with her.

She had reached the lower part of the river, near the Rope Ferry, where the channel having six feet of depth at half tide, extends over some 450 or 500 feet in width. At this time the schooner Ontario was beating up, and in her immediate vicinity. Both did what was in their power to prevent collision; but in the judgment of the experienced ship masters, who favored me with their advice as assessors, a collision had become inevitable. The result was, that the schooner struck one of the canal boats in tow of the steamer, and sunk her; and this libel is filed by the proprietor of the sunken boat to recover his damages.

As no blame is imputable to either party, other than is implied in this statement of the facts, the case would at first seem one of those in which by the maritime law each party bears his own loss. But, viewed more closely, there are circumstances connected with it which might justify

the application of a still severer rule against the complainant.

I readily agree that some of the rules which are obligatory on ordinary steamers when meeting sail vessels, are inapplicable to steam tugs engaged in towing. The superior control over her movements, which belongs to a steamer, her power to vary or arrest, or even reverse her course at pleasure, and which enable her generally to avoid collisions, do not belong to the steam tug, which gives a secondary impulse to a fleet either attached to her sides or following in her wake. The momentum of the system, of which, under such circumstances, she forms part, may be altogether too great for sudden control. In a case, therefore, where the steam tug had neglected no precaution, I should be unwilling to hold her liable to the same extent or under the same law as a detached steamer.

But to exempt herself from liability on this score, she must be careful not to heighten the risk of herself and others by any want of prudence either in the disposition of her convoy or in the manner of navigating it. The number and size of the vessels which she takes in tow should have careful relation to her power of regulating their movements, and to the nature of the voyage, the number of vessels to be passed or encountered by the way, and the facilities of the particular navigation. On the open bay, or in some of the comparatively unfrequented sounds and inlets of the coast, she may occupy a larger space, and move with less anxious caution, than in the narrow, eccentric and crowded channel of a river like the Schuylkill. Where the voyage is necessarily attended by special hazards, she must sedulously avoid enhancing them. The state of the tide and of the wind are to be regarded, because these may be such as materially to impair her effective power. Where the channel becomes more

tortuous or difficult, and other vessels are approaching, she should take that position in the river which may best allow them to pass her, moderate her speed, and stand ready in case of emergency to cast off from her guards and let her whole train of boats pass astern.

The steamer in this case, and her train, including the complainant's boat, engrossed a much greater portion of the river than they had a right to. The wind and tide were with them, and the moving mass under their influence as well as that of steam, was undoubtedly too great to be at once arrested or adequately controlled by any action of the steamer's engine.

The captain of the steamer did his best, no doubt, to avert the accident, when he found himself close on the schooner; but it is plain, also, from the evidence, that the schooner could not then escape the collision by any effort of seamanship. Without invoking the rule, therefore, which denies recourse to the libellant where no immediate blame is imputable to the other party, I dismiss the libel on the ground that the steam tow was to blame in spreading itself so widely over the channel.

The gentlemen who heard the case with me, and whose familiarity with the subject of our river navigation gives great value to their suggestions, have communicated to me a few rules, which, if generally observed, may in a great degree prevent such accidents as the one we have been considering. I have, of course, no right to prescribe them as imperative: but they seem to me so reasonable, that, as at present advised, I shall adopt them for my guidance in cases hereafter to arise. They will be appended to this opinion.

The decree of the Court is for the Respondent, but in consideration of the peculiar circumstances, it will not carry costs.

Per Cur. Decree accordingly.

Rules proposed by captains Gulager and Pedrick, referred to in the foregoing opinion :

We have carefully considered the subject of the collision occurring upon the river Schuylkill, and would respectfully suggest the following regulations, as proper to be observed in the navigation of that river, with the view of diminishing their frequency :

1. That all steam tow boats, bound up or down said river with vessels in tow, be required to keep as near the right hand or starboard shore as their respective drafts of water will permit. By this arrangement vessels bound up the river in tow of a steam boat, will keep nearest the eastern shore, and those bound down to the west ; leaving the mid-channel for sailing vessels.

2 That in consequence of the general narrowness of the channel of the Schuylkill, steam tow boats should avoid placing more than one vessel on each side or abeam, but shall tow the remainder astern.

3. That sailing vessels be prohibited from passing between the tow boats so employed and the shore they occupy, as above mentioned.

4. And as it frequently occurs, that several vessels bound in the same direction are obliged to pass near to each other when sailing on opposite tacks, beating to windward in narrow channels, and much damage by collision takes place in consequence of neither vessel being willing to lose ground by giving way ; we recommend that the law of the English waters be adopted in such cases, viz : That the vessel on the starboard tack keep her wind, or not alter her course ; but the vessel passing her on the opposite or larboard tack, shall if necessary keep away, and pass astern of the vessel first mentioned.

Respectfully submitted,

C. GULAGER,
S. PEDRICK.

Phil'a., December 2, 1848.

Court of Errors and Appeals of New Jersey.**APRIL TERM, 1848.****OONOVER, APP. v. WRIGHT, RESPONDENT.***Appeal from the Decree of the Chancellor.*

1. The statute of limitations of New Jersey, (*Rev. L.* 411 § 10, *Rev. Stat.* 95 § 11,) applies to the action of dower, and may be pleaded in equity as well as at law.
2. When a bill does not state any circumstances to take the case out of the statute, the plea may be a pure plea.
3. It is not required to be accompanied by an answer when the bill simply contains the formal allegation in regard to title papers, usual in bills of dower, in order to bring them within the jurisdiction of a Court of Equity.

The respondent, on the 9th of July, 1846, filed her bill of complaint in the Court of Chancery against the appellant, in which she sought to recover dower in certain lands in his possession. The bill stated the seisin in fee of her former husband Barzillai Wright, a sale by the Sheriff of his interest to the appellant, and that after such sale her husband died on 1st day of March, 1836, leaving the complainant him surviving entitled to dower in the said freehold premises.

The defendant pleaded in bar that the said Barzillai Wright died above twenty years before the filing of the said bill or service of process, and that the right or title and cause of action, if any, of the complainant accrued above twenty years before the filing of the said bill or service of process; and, therefore, that the defendant pleaded the statute of New Jersey, entitled, &c.

The cause was heard before the Chancellor upon bill and plea, under an agreement, that if the plea should be allowed by the court, it should be considered as proved, and a final decree made thereon.

The Chancellor, after argument overruled the plea of the defendant with costs, and from this order the defendant appealed.

CARPENTER, J., delivered the opinion of the Court.

Whether Courts of Equity act in obedience, or in mere analogy to the statutes of limitations, it has become a settled rule that they will apply them in similar cases within the sphere of their jurisdiction, equally with courts of law. They have always felt themselves bound by the spirit and meaning of these statutes, and ordinarily act in conformity to them. In cases concurrent with a remedy at law they always allow them to be pleaded, and a party is not permitted to evade their effect by resorting to another forum. *Angell on Limitations*, Ch. 3. p. 24; *Saxton* 691.

The objection, it would seem, may be taken by demurrer to the bill, if so framed that it appears on its face, and no attendant circumstances are stated which will obviate it. If the objection does not appear on the face of the bill, as in the present instance, it may be taken by way of plea, or by way of answer. When the objection is raised by way of plea to a bill which does not state any circumstances to take the case out of the statute, such as fraud, &c., the plea may be a pure plea; though otherwise, if the bill should charge a fraud which had not been discovered within the period named in the statute. In such case the plea should be accompanied by an answer, answering and denying the circumstances of fraud alleged in order to avoid the bar. *Story Eq. Pl.* § 503; *Ib.* §§ 751, 754. The bill in this case is in the ordinary form of a bill for dower. The death of the husband is alleged within the period mentioned in the statute. No unusual circumstances of equity jurisdiction are stated. It alleges no matter of concealment in order to avoid the operation of the statute; no ignorance of her rights is pretended by

the complainant. The bill contains nothing beyond the formal allegation in regard to title papers always found in such bills, for the purpose of bringing, what is ordinarily a mere legal right, within the jurisdiction of a Court of Equity. If the statute applies to dower, the defence seems to have been properly raised by the plea filed by the defendant.

But it has been urged upon the part of the Respondent, that the 10th section of our statute of limitation, (11th in the Revision,) does not apply to the action of dower, and consequently cannot be pleaded either at law or in equity; and such is the view taken by the Chancellor. One section of our act copied from the English statute of 21 Jac. 1 c. 16 sec. 1, bars the right of entry into any lands, &c., unless made within twenty years next after such right or title shall accrue. The widow has no right of entry until dower assigned, and the statute (21 Jac. 1) in England, and similar statutes in this country, have therefore been construed not to apply to the action of dower. It applies only to a right of entry, and therefore, by its terms is inapplicable to the action of dower which is founded, not on a right of entry, but upon an inchoate right to have the one-third part of any lands of which the husband had been seized at any time during coverture set off, and assigned to her.

But the next section (Rev. L. 411 § 10) goes further and enacts "that any real, possessory ancestral, mixed or other action, for any lands, &c., shall be brought or instituted within twenty years next after the right or title thereto, or cause of action shall accrue, and not after:" with a saving clause in favor of infants, feme covert and insane. It, in very terms, applies to all actions for the recovery of lands, tenements and hereditaments, and it is difficult to see how it can fail to apply to the action of dower. It bars not the right of entry merely, but any ac-

tion brought for the recovery of land, &c. Land is sought to be recovered in this action, and the widow's title becomes absolute on the death of the husband. By the statute of *Magna Charta*, the heir has forty days within which to assign dower, a provision incorporated into the third section of our act relative to dower. If not assigned within that period the tenant becomes guilty of a forfeiture and liable in an action of dower. The widow's title and her right of action then accrue, the possession of the tenant as against her becomes adverse, and the statute begins to run.

It is true, lapse of time is not enumerated in the statute relative to dower as a bar to the action, and obviously because it naturally falls within another classification. *Parker v. Obear*, 7 Metc., is a decision upon a statute very analagous to our own, but that decision may well be sustained upon the ground that in Massachusetts the widow's cause of action does not accrue at the death of her husband, but only from the time of demand made. Here a demand is not necessary in order to support the action, although it may be important as affecting the amount of damages. Taking a different view from the Chancellor of the policy of the statute, and holding the action of dower to be not only within the letter, but the meaning and spirit of the statute, we are unanimously of the opinion that his decree must be reversed.

The decree is reversed with instructions to enter a decree for the defendant, with costs in the Court below.

Supreme Court of Illinois.

DECEMBER TERM, 1848, AT MT. VERNON.

*From the Western Legal Observer.*LEONARD WHITE *et. al.*, Plaintiffs in Error, *v.* BY WILSON, Defendant in Error.

ERROR TO HARDIN.

An affidavit in an attachment suit set forth "that the said White and Sloo were about to remove their property from this State to the injury of Wilson." This fact was traversed by plea in abatement, and under this issue, the defendant offered to prove that one of them had sufficient unincumbered personal property in the State to discharge the plaintiff's demand. The evidence was objected to and excluded by the Court: *Held*, that the Court erred in excluding the evidence.

To sustain an attachment on the ground that the debtor, "is about to remove his property from this State to the injury of such creditor;" two things must concur; *First*, the debtor must be about to remove his property from the State, and *Second*, such removal, if effected, must be to the injury of the creditor.—The single fact that he is about to remove his property from the State will not justify a creditor in seizing it by attachment.

Attachment, in the Hardin Circuit Court, brought by the defendant in error against the plaintiffs in error, and heard before the Hon. William A. Denning, and a jury, at the ——— term, 1848, when a verdict and judgment were rendered for the plaintiff below for \$208 57½.

The facts material to the issue are adverted to by the Court in their opinion.

W. B. Scates, for the plaintiffs in error.

1. The statute predicated an attachment upon the *removal of property to the injury of another* does not contemplate nor intend that every removal of property in the fair and regular course of commerce and trade is to the injury of creditors.

2. It being in proof that plaintiffs had been for some

time previous in a regular course of trade with the company to whom the iron was sold, and this iron, even if belonging to them, being about to be removed in such regular course of trade—any evidence tending to show the individual solvency, within the jurisdiction, of one of the partners, whose property would be liable upon failure of partnership effects, would rebut and disprove the allegation of injury in the affidavit and issue.

3. They were material allegations in the affidavit, and traversed by the plea, that the property belonged to plaintiffs; that it was about to be removed; and that that removal was injurious to the defendant. He cannot select any particular property and maintain that its removal will *injure* him so as to sustain an attachment, whilst other property, partnership or individual, remains within the jurisdiction, which may be reached by a general judgment upon personal service, and which could have been had in this case.

This is a new clause in the attachment law and ought to receive a sound and equitable construction, which will not interrupt the fair course of trade, and so work injustice. Rev. Stat. 63, § 1.

T. G. C. Davis, for the defendant in error.

The opinion of the Court was delivered by TRUMBULL, J.

Wilson commenced an action of *assumpsit* by attachment against White & Sloo, as partners. The attachment was levied upon a quantity of pig iron. The affidavit, upon which the writ of attachment issued, after setting forth the nature and amount of the indebtedness, alleged, "that the said White & Sloo were about to remove their property from this State to the injury of Wilson." The plaintiffs in error filed a plea in abatement traversing the fact of their being about to remove their property from the State to Wilson's injury. The issue upon this plea was found against the plea, and judgment entered that

plaintiffs in error answer over, which they did, by filing a plea of *non assumpsit*, the issue upon which being determined against them, judgment was rendered in favor of the defendant in error for \$208 57½

All the evidence before the jury upon the trial of the issue in abatement is preserved by bill of exceptions.— This evidence shows that the plaintiffs, previous to the commencement of this suit, had been engaged in making pig iron in the county of Hardin, and in trading with a firm in Cincinnati or Louisville. Some fifty tons of pig iron, being all the personal property which the plaintiffs owned in said county at that time, was attached. The plaintiffs in error offered to prove by one Robinson, that one of them owned a large amount of personal property in this State free from any incumbrance, and more than sufficient to discharge said Wilson's demand, which testimony was objected to by the defendant in error and excluded by the Court as improper. This decision of the Court is assigned for error, and it is the only question before us, the other errors having been abandoned upon the argument.

Admitting that the plaintiffs were about to remove the property attached from the State, the question is, whether the testimony of Robinson should not have been permitted to go to the jury as tending to show that such removal would not operate to the injury of Wilson.

The provision to the eighth section of the Attachment Act authorizes a plea in abatement traversing the facts in the affidavit, and the issue in this case was proper. In determining upon the relevancy of the testimony offered, it becomes necessary to put a construction upon that clause of the statute permitting a creditor to sue out an attachment when his debtor "is about to remove his property from this State to the injury of such creditor." To sustain an attachment under this provision of the statute

two things must concur: *first*, the debtor must be about to remove his property from the State, and *second*, such removal, if effected, must be to the injury of the creditor.

The single fact that a debtor is about removing his property from the State will not justify a creditor in seizing it by an attachment; if it would, dealers in the produce of the country, and who are engaged in forwarding it to markets out of the State, would hold their property at all times and while engaged in their ordinary business, liable to be seized by attachment to the great embarrassment of the trade and commerce of the country. It cannot be supposed that the Legislature intended to put into the hands of every creditor the means of so greatly annoying his debtor, and interrupting the ordinary business of the country, unless the acts of the debtor were calculated in some way to prove injurious to the creditor's rights. Why should a creditor be permitted to harass his debtor by a proceeding that can do the creditor no good, while it may do the debtor great harm? The process by attachment was never designed to be used where the creditor could reach the person and property of his debtor by the ordinary Common Law process, but only in cases where the debtor resides out of the State; or is about placing his property beyond the reach of his creditor proceeding in the ordinary way. It became, then, material to inquire in this case whether, if the property about to be removed by the plaintiff, had been taken out of the State, such removal would have operated to the injury of the creditor. How was this to be ascertained? We answer, from the circumstances of the case. Another provision of the statute authorizes an attachment to issue when a debtor is about to depart from the State, with the intention of having his effects removed from the State. How is this intention to be made to appear? By the acts and declarations of the debtor, and all the various circumstances by which men

judge of each others' intentions. So, in this case, any facts or circumstances tending to show that the attaching creditor would not be injured in the collection of his claim, by the removal from the State of the property which plaintiffs were about to remove, were proper to be given in evidence upon the issue in abatement. Such were the facts which the plaintiffs proposed to prove by Robinson.

If Sloo, one of the plaintiffs, had an abundance of unincumbered property within the State to satisfy the claim of Wilson, and out of which he could make his debt, it was surely a circumstance tending to show that the removal from the State of the particular property attached, in the regular course of business, was not to the injury of the attaching creditor. The joint property of the firm of White & Sloo and the individual property of the members of said firm were both liable to be taken in satisfaction of the defendant's claim, and the plaintiffs offered to show that the individual property of Sloo was more than sufficient for that purpose. This they should have been permitted to do in support of their plea in abatement, and because they were not, the judgment of the Circuit Court is reversed and the cause remanded for a new trial upon the issue in abatement.

Judgment reversed.

Circuit Court of the U. S. for the District of Illinois.

SPRINGFIELD, DECEMBER TERM, 1848.

ARROWSMITH v. BURLINGIM.

The Statute of Illinois of 1838-9, "to quiet possession and confirm titles to land," is not a limitation law. It is a Legislative conveyance and adjudication of one man's land to another, and therefore unconstitutional.

Ejectment for a quarter section of land in Adams county, Illinois.

POPE, J., delivered the opinion of the Court, from which

we make the following extract taken from the *Western Legal Observer*, Vol. 1, p. 50.

Is the defendant protected by the statute of 1838-9 "to quiet possession and confirm titles to land?" The defendant contends that it is in effect a limitation law. If not, that it is within the competency of the Legislature to act upon the right in this manner so as to divest it. So much of the Act as is material to this controversy is as follows, viz :

"Every person in the actual possession of lands and tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also during said time pay all taxes legally assessed on such lands and tenements, shall be held and adjudged to be the legal owner of said lands and tenements to the extent and according to the purport of his or her paper title."

Is it a limitation law? It does not profess to be one either in its title or body. But it is said at the bar, that limitation laws have their origin as to real actions on the assumption of *abandonment*. No adjudged case or dictum in support of it has been shown, and none is believed to exist; but abundant authorities can be shown to the contrary. (See *Blackstone's Com.* 188, and following pages.) That position, then, is dismissed with the remark that it is more ingenious than solid.

It is, then, a legislative conveyance and adjudication of one man's land to another. The land passes against all the world not enumerated in the saving clauses. The divestiture is declared to depend upon the act of another, not for any fault of omission or commission in the true owner, who is not required to improve the land nor to pay the taxes; and if he did pay the taxes regularly, it would not save his property. Can legislatures in this enlightened

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age, with written constitutions to restrain them, take from one and give to another his property with or without compensation? It is only necessary to state the proposition in its nakedness to meet refutation.

But the great question must be met fearlessly, but with a profound sense of the responsibility incurred by a judge when he interposes the ægis of the law in defence of a citizen whose property is divested by a legislative act, which imputes to him no blame, and holds out to him no recompense for his loss. This act requires of him nothing, nor does it hold out threats of forfeiture for the doing or not doing anything; but gives his property to another in terms on specified conditions.

Is it within its constitutional powers? A slight glance at the construction of society may be not without profit in the solution of the problem. Man was sent into the world by his Maker to seek his happiness; furnished with a code of laws, enacted by an all-wise and benevolent God, implanted in his heart. Although those laws were perverted by imperfect man, their perfect beauty and adaptation to the moral government of the world is in a constant course of development as christianity, civilization and true knowledge advances. His rights and obligations had and have their existence in that law. But man's happiness was insecure in his insulated condition. He was inspired with social tastes. The social state promised increased happiness in the security it would afford to his person and property. Hence the social compact. In this compact it was agreed that man should surrender as many of his natural rights as was deemed conducive to the general good, and received in return the engagement of the society to protect him in his person and property. And for the surrender of the natural right to take redress for wrongs in his own hands, the society agreed to afford him suitable remedies for the injuries he might be exposed to.

These obligations imposed upon the society the duty to establish a government ; a legislature, to prescribe rules of conduct ; a judiciary, to expound them ; and an executive to enforce them.

It would be unprofitable to give here an exposition of the origin and progressive changes in the titles to real estate in England. It is sufficient to say, that, until the latter part of the seventeenth century, they differed widely from ours. With us the tenure is *free and common socage* ; the tenure of a freeman. And a freeman may buy and sell at his pleasure. This right is not of society, but from *nature*. He never gave it up. It would be amusing to see a man hunting through our law books for authority to buy or sell, or to make a bargain. The search would be vain. Society indeed may prohibit the making contracts injurious to the common good. This is a salutary restraint upon his natural right. No grant is needed. *Rights* are from nature. Titles and remedies are the invention of society. The latter are changeable at the will of the legislative department. Remedies may be granted or withheld ; and as the legislature has none over *it*, there is none to control it. But the former—*rights*—are sacred, and cannot be invaded but by upturning the first principles of society ; without violating the great the only object and conditions of the social compact Magna Charta only asserted first principles. So the articles of the constitution of this and other States are only recognitions of those principles that uphold all free governments ; the violation of which would dissolve the obligations of obedience.

In this enlightened age no government dare do it, without incurring a moral responsibility that no man will dare encounter. The omnipotent Parliament of Great Britain dare not.

This act is so fraught with disaster to the country in

the insecurity of property, &c., that this Court must assume that the Legislature was not aware of a tithe of the evils they were entailing on the country if this law were sustained. The principle embraced and put forward in the law is at war with freedom. For the man is a slave whose property is unsafe. This act presents a strong anomaly. If the plaintiff had committed a crime causing forfeiture, his property could not be taken from him but upon a judicial decision; but for no imputed fault it is taken from him by this act without a trial. Hence, in the argument, the defendant's counsel earnestly repelled the idea of forfeiture in this case. The United States sold their lands for a full price, and gave a grant in fee simple unconditionally. It is under a grant of this kind that the plaintiff claims. In case of actual settlers, full payment of the land must be made, and all the favor they have is in the right of pre-emption. In this case the State of Illinois gives without price that which is not hers, but a citizen's. "No person shall be disseized of his freehold, &c., unless by the judgment of his peers or the law of the land." This is only declaratory of first principles.—The only value of it is to restrict the government to a particular mode of divesting the title. "The judgment of his peers or the law of the land." The authorities agree that this must be done through the courts.

Supreme Judicial Court--Maine.

MASON v. MASON.

Assumpsit will not lie by one tenant in common against another for rents and profits of the common estate.

The parties to this action were tenants in common of a parcel of land, of which the defendant was in possession. The plaintiff undertook to cut grass upon the premises,

but was forbidden by the defendant, who cut it himself. The plaintiff afterwards brought an action of *assumpsit* (declaring in a count for money had and received,) for one half of the income of the land. The defendant objected that *assumpsit* would not lie by one tenant in common against another for the rents and profits of the common estate.

Howard and Shepley, for the plaintiff.

Fessenden, Deblois, and Fessenden and True, for the defendant.

The Court (by SHEPLEY, J.,) sustained this position, denying the position of the plaintiff that an action of *account* would lie, and therefore *assumpsit* would lie also.—An action of *account* will not lie, at common law, by one tenant in common against another, and the statute of Anne, which altered the common law, gave the action of account only where one tenant in common received more than his just share as bailiff. And in England, under this statute, it has been decided that the tenant, who takes the income merely, is not liable in an action of account; he must be the bailiff of the other tenant, and, as such, receive more than his share. There is no case in which an action of *assumpsit* has been sustained on any different principle, and none can be sustained unless money has been actually received, or one tenant holds the share of the other as bailiff. The case of *Munroe v. Luke*, (1 Met. 459,) was decided on this principle. The defendants, in that case, took the whole rents and profits in money.

Judgment for defendant.—1 M. L. R. 120.

Supreme Court of Tennessee--September Term, 1848.

*Reported for the Knoxville Tribune by O. P. Temple and
R. H. Armstrong, Esqrs.*

UNION BANK OF TENNESSEE, Plaintiff in Error, *vs.* C. M. McCLUNG,
Executor, &c., and C. WALLACE, Defendants in Error.

This was an action of *debt*, commenced originally by the plaintiff in error, in the Circuit Court of Knox county, on a promissory note for \$3,690, due four months from July 30th, 1844, against H. L. McClung and William B. French, the makers, and the defendants in error, as endorsers of the note. The said makers put in simply a plea of payment; and the defendants in error, among other pleas, put in by them separately, relied in their defence, on the evidence upon the plea that the bank, the holder and legal owner of said note, contracted and agreed for a valuable consideration with the said makers to give them further indulgence and to delay the time of the payment of the same, which indulgence and delay was accordingly given, all of which was without the consent and concurrence of the said defendants. This plea was pleaded by both of the defendants in error, separately also.

On the trial of the cause in the Circuit Court, there was evidence before the jury (as appears from the bill of exceptions,) to this effect: That after the note was protested, which was the 3rd of December, 1844, other due and legal notice of the same was given to all the parties concerned—it was permitted to remain in bank without any further proceedings thereon, until the 22d of September, 1845, when Hugh L. McClung, one of the makers, learning that the bank directors were not satisfied with the notes remaining so, addressed them a written communication, in which he represented to them, that he

hoped soon to be in a condition to pay the note without suit, and asked that it should be put out for collection until he had further time in which to provide for its liquidation. The directory took no action upon this communication, but permitted the note to remain without suit, or other proceeding thereon, until the 23d of May, 1846, when Hugh L. McClung, learning that the directory were arranging to institute suit upon this as well as other claims due the bank, addressed them another letter, asking further time, and stated that he had assurances that he would realize sufficient means with which to pay the note before the lapse of another term of the Circuit Court, and that he greatly desired to arrange the claim without suit. The directory took no action upon the contents of this letter, further than on the 26th of May, 1846, they made an order upon the banks' books to the effect that the note should not be then sued upon, inasmuch as some of the parties were not in the county, so that process could be served on them, provided the bank directors should think the safety of the claim would not be jeopardized by the delay. It was further proved by the cashier of the bank, that Hugh L. McClung had another note in bank besides the one sued upon, that before the maturity of either, he had expressed apprehensions to him (the cashier) that he would be unable to meet them, and he requested through the cashier, that the directory, in the event the notes were protested, would permit them to remain in bank without suit, and that they would allow him to pay the regular calls upon them without the ordinary forms of a renewal, and exempt him the said H. L. McClung from the consequences of a dishonor in bank by means of the protest. The cashier communicated this proposition to the board, and they took no formal action upon it, but it seemed to be a tacit understanding among the directory, that said McClung was exempted from the

rule of said bank, which dishonors its debtors after protest, and another paper was renewed or discounted with said McClung's name upon it after these notes were protested. The said McClung also paid some of the calls on his other note, which is not the foundation of this suit; but the cashier stated that there never was any agreement with M'Clung not to bring suit upon his notes at any time the directory might choose to do so.

This was substantially the evidence. The jury rendered a verdict in favor of the bank for the amount of the note with interest against the makers; but found in favor of the defendants in error. Whereupon the plaintiffs moved the court for a new trial as to the defendants in error, which the court refused to grant, but entered up judgment according to the finding of the jury. And from which judgment the plaintiffs prayed and obtained an appeal as to the defendants in error only. In the Supreme Court the attorneys for the defendants in error moved to strike the cause from the docket, because the appeal had been prayed and granted as against them alone, without joining their co-defendants in the court below.

J. M. Welcker and T. A. R. Nelson, for plaintiff in error; Wm. H. Sneed and Horace Maynard for defendants.

TURLEY, J., delivered the opinion. Held, that a motion for a new trial can be legally made against a part of the defendants in favor of whom a verdict had been rendered, though the verdict in favor of the plaintiff against the other defendants was not set aside. The appeal in this case was properly taken.

That the delay stated and proved was sufficient to discharge the endorsers of their liability. It is not necessary that there should be a positive agreement to accept of the proposed terms of contract. An implied one will do, as in the above case, when the parties acted upon the proposed terms in the manner they would have done pro-

vided there had been an express agreement to the same effect.

The jury were right in finding the verdict they did—they were supported by sufficient proof. The Circuit Judge committed no error in refusing a new trial.

Judgment affirmed.

Supreme Court of Ohio. December, 1847.

Cushing Thomas v. Henry Cronise—Chancery—Seneca. READ, J., Held that where a deed of land has been executed upon the consideration of a bet upon the result of an election and delivered, the parties being in *pari delicto*, the Court will not set aside the deed, but will leave parties as it finds them. Bill dismissed.

Wm. Chesnut v. Lessee of Margaret Shane—Error—Ross. BIRCHARD, C. J., Held, that a deed of a married woman is valid and passes her estate where there exists no other objection than that the justice in certifying the acknowledgment, has omitted incorporating into the certificate the statement that before and at the time of her making such acknowledgment, he made the contents known to her by reading or otherwise.

2. That an act of the Legislature that divests vested rights, that violates contracts, or that assumes to control or exercise *judicial powers*, is unconstitutional and void.

3. That the act of March 9, 1835, is not liable to either of these objections and is a valid law.

4. That a confirmatory act which merely assumes to cure an informality in the certificate of the magistrate, creating no new title and affecting no right but such as equitably flows from the grantor, that merely accomplish-

es what upon the principles of natural justice a court of chancery ought to decree, may have a retrospective operation, when the manifest design of the Legislature was that it should thus operate.

5. That in construing ancient statutes, contemporaneous construction as evidenced by usage will not be departed from without most cogent reasons, and if the construction be doubtful, usage will control.

The cases of *Connell v. Connell*, *Good v. Zercher*, *Meddock v. Williams*, and *Silliman v. Cummins*, overruled, and in the case at bar the judgment below reversed.

Franklin Holliday et. al. v. Franklin Bank of Columbus et. al.—Chancery—Knox. READ, J., Held that where there is a senior judgment not levied within the year, a junior judgment and levy which gives it preference, and an intervening mortgage which holds as against the junior judgment, the senior judgment shall be first satisfied; next the mortgage; and that the junior judgment is postponed to both.

2. That a mortgage has no effect either in law or equity previous to its delivery to the Recorder of the county for record.

3. That where a mortgage is delivered to the recorder for record on the first day of Court, but previous to the hour at which the Court actually convenes, it will prevail against the lien of a judgment rendered at the same term.

Supreme Court of the United States.

AT WASHINGTON, FEBRUARY 7, 1849.

SMITH v. TURNER.—NORRIS v. CITY OF BOSTON.

The power of Congress to regulate commerce is exclusive.

Statutes of the several States which impose a tax upon passengers arriving from abroad, are unconstitutional, although States may pass *quarantine* laws, and impose penalties and exact payment of expenses, such laws not being regulations of commerce.

These were two cases from New York and Massachusetts, and the question arose in each upon the validity of the "alien passenger" tax as imposed by their respective statutes. In the first case the commissioner of emigration sued the owners of a vessel arriving at the port of New York in 1844, for the amount due on the whole number of passengers in the ship, at one dollar per head. This was in conformity to a law of the State of New York.—The defendant's demurrer set forth that this law was a "regulation of commerce," and therefore unconstitutional. But the Supreme Court and Court of Errors overruled the demurrer and gave judgment against the defendant. The case came before the Supreme Court upon a writ of error. The other case *Norris v. City of Boston*, was an action of assumpsit for money had and received, to recover thirty-eight dollars, the amount paid by the plaintiff to Calvin Bailey, the regularly appointed boarding officer, (appointed by the city council of Boston, agreeably to stat. 1837, ch. 238,) and the ordinance of the city. This case was argued at the Court of Common Pleas, October Term, 1839, upon an agreed statement of facts, where it was held by WILLIAMS, C. J., that the statute (ut sup.) was constitutional, and the plaintiff became non-suit. To this ruling he alleged exceptions, and

the case was argued before the Supreme Court of Massachusetts, at the March Term, 1841, and an opinion, 4 Met. 282, delivered at the next March Term, sustaining the constitutionality of the Law.* This case was likewise carried up on a writ of error.

In the New York case, Ogden and J. Prescott Hall, for the plaintiffs in error, Willis Hall and John Van Buren for the defendants in error.

In the Massachusetts case, Webster and Choate, for the plaintiffs in error, Davis and Ashmun, for the defendants in error.

McLEAN, J., delivered the opinion of the Court.

There are two questions: 1. Is the power of Congress to regulate commerce an exclusive power? 2. Is the statute of New York a regulation of commerce? It is admitted that the States have not parted with any power, except by express grant in the constitution, or by necessary implication. All powers which concern our foreign relations belong to the federal government exclusively.—A review of the opinions of judges in all the cases in which the question has arisen, leads to this result. There cannot be a concurrent power in two sovereignties to regulate the same subject. It would involve an absurdity, and produce inevitable collisions. The power, then, over commerce, is exclusively vested in Congress.

Is the law of New York a regulation of commerce? The States may guard against the introduction of any thing which may affect the health or morals of their citizens; but they are limited to what may be absolutely necessary for that purpose. Commerce includes navigation

*We subjoin § 3 of this act. "No alien passengers, other than those spoken of in the preceding section, (i. e. such lunatics, idiots, paupers, &c., for whom bonds are required,) shall be permitted to land until the master, owner, consignee, or agent of such vessel, shall pay to the regularly appointed boarding officer, the sum of two dollars for each passenger so landing, and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct, for the support of foreign paupers." Stat. 1837, ch. 238.

and intercourse, as well as the exchange of commodities, and therefore includes the transportation of passengers. To encourage foreign emigration was part of the early policy of our government; and a large amount of tonnage has always been engaged in the carrying of passengers. Pilot laws are regulations of commerce, and the State laws have become the laws of Congress by adoption.—The act of Congress expressly adopts them. They are not laws by force of any State power. A State may do many things which affect commerce,—though it may not regulate it. It may tax a ship belonging to a citizen; but it is then taxed as part of the general property of the State. The act of New York is called a health law. The funds collected are called hospital money. But it is difficult to see how it can be a health law. Part of the funds go to support institutions for juvenile offenders, and it might as well be applied to all the general purposes of the State. It might be increased so as to pay all expenses.

The decision in the case of *The New York v. Miln*, 11 Peters, S. C. R. 102, is entirely consistent with these views. That case was decided upon the ground that the law only operated *within* the State of New York. It imposed no obstruction to commerce nor did it cause any delay.

The transportation of passengers is regulated by acts of Congress; and being a branch of commerce, the act of New York is a regulation of it, and therefore void.—After passengers have left the ship and mingle with the citizens of the States, then they may be taxed. A tax like this destroys the uniformity which ought to exist throughout the Union. The municipal power of the States cannot prohibit the introduction of passengers, except to protect itself against disease. Congress has passed acts in aid of the State regulations of quarantine,

and thus they have become regulations by Congress itself.

If New York may thus tax passengers, citizens of the United States as well as foreigners,—then every other State may do the same, on every railroad and river throughout the Union. Perhaps nine-tenths of the passengers landed at New York pass through to other places. The police power cannot pass beyond its proper limits. In guarding the health of its citizens, it cannot authorize a tax which regulates commerce.

CATRON, J., read an opinion giving his reasons for concurring in the judgment. Among other things, he claimed that Congress has, by its legislation, covered this entire subject, and referred to several acts in relation to the transportation of passengers; and that the act of New York was a violation of the 14th article of the treaty of 1796 with Great Britain.

The opinion of MCKINLEY, J., was read by CATRON, J. It concurred in declaring the laws void; but added an objection founded upon that article in the constitution, which relates to the importation or migration of persons into the country before the year 1808.

GRIER, J., concurred, but read no opinion.

WAYNE,* J., concurred entirely in the opinions given

*Mr. Justice Wayne is said to have made a curious statement in regard to the case of *New York v. Mills*, which had been so much relied on by the counsel for the defendants in error, and in which it had been decided that the tax on alien passengers was a health regulation, and not in conflict with the exclusive power of Congress to regulate commerce. He wished to set the court *rectus in patris* in regard to that decision. It had never commanded the assent of a majority of the court. At that time the court consisted of only seven members. Three judges were in favor of asserting the exclusive power of Congress for the regulation of commerce, and three were opposed to it. Justice Baldwin did not agree in the reasoning of either side. Justice Thompson was designated to write out an opinion for the court. He did so, but taking the ground that persons were not the subject of commerce, and that the act was merely a health regulation. The other judges would not adopt it, and Judge Thompson read it in court as his own opinion. Judge Barbour was then selected to write out the opinion of the court, which he did. It was read the day after the adjournment, and in presence of all the members of the court, but Judge Baldwin. When he examined it he at once dissented from it, and without his assent it had not the assent of a majority of the court. Judge Baldwin

by CATRON, J., and McKINLEY, J., but said it was not necessary to decide the question of the exclusive power of Congress, although on that point he concurred with McLEAN, J. He stated eight propositions, substantially as follows :

(1.) The acts of New York and Massachusetts are unconstitutional and void, being regulations of commerce. (2.) States cannot tax commerce of the United States for support of police laws. (3.) Congress having by sundry acts regulated the admission of aliens, the acts in question are in violation of said acts of Congress. (4.) The acts of New York and Massachusetts, imposing a tax or obligations on masters of vessels engaged in commerce, are void as being violations of the constitution and the acts of Congress. (5.) The ninth section of the first article of the constitution concerning the importation and emigration of persons prior to the year 1808, relates to other persons, as well as slaves. (6.) The prohibition by the constitution of giving a preference to one part over another is also infringed. These taxes are a violation of the article which requires uniformity of taxation. (7.) The power of Congress over commerce includes navigation and the rights of navigation in all its branches, and the transportation of passengers is one of its branches. (8.) States may pass quarantine laws, and impose penalties, and exact payment of expenses, and such laws are not regulations of commerce.

immediately went in pursuit of Judge Barbour to have a correction made. He had just left his lodgings for the steamer, which was to convey him home.— Judge Baldwin, therefore, had no remedy for misrepresentation of his opinion and vote upon the bench—for he had agreed to the opinion, before it was written—but to express his dissent in his book, called *views of the constitution*.— The effect of this series of errors, is that an irrevocable law is passed by the Supreme Court by a vote of three to four. It has gone forth to the country as judicial law; on the faith of it suits are brought, and great expense is incurred in litigating them. At the eleventh hour of the eleventh year of its duration, however, one of the judges who voted against the law, brings to light the mode in which it was passed, and announces that this court will no longer enforce it.

[*Ed. M. L. Rep.*]

TANEY, C. J., dissented. There is a difference between the cases of Massachusetts and New York. The law of the former State affects the passenger after the arrival within its jurisdiction and before landing. It is a part of the pauper law of the State, and intended to create a fund for the support of foreign paupers. Its character cannot be misunderstood. If the passenger chooses to remain on board, and not to land, nothing is to be paid. It is a tax upon the passenger. If the plaintiff recovers, he will recover the money which he has paid for others.

The first inquiry, therefore, is, whether the constitution has given to the general government a power to compel the State of Massachusetts to permit any person of any description, paupers or otherwise, to come into its borders? Congress has never attempted to exercise any such power. This question was decided, in my opinion, in several cases. The State may remove persons who are hostile to its peace or morals, and if it may expel, it may keep them out. The State alone has this power.— This was so decided in *Groves v. Slaughter*, 15 Peters, 297, in Mississippi, in relation to the introduction of slaves. The United States have no power over the question who shall, or shall not, reside in a State. The State alone may exercise this power according to its discretion. If the general government can control this power in any respect, then the real and substantial power is in Congress and not in the States. But the State has, in my judgment, the sole control of this whole subject. Now, Massachusetts deems the introduction of pauperism and disease a dangerous incident to the introduction of aliens, and the history of the case shows that a fearful amount of increase of expense has been thrown upon her. She, then, having the right to reject and refuse aliens entirely, may annex such conditions as seem proper to protect the interests of her own citizens, and extend her humane

provisions to this class of unfortunate strangers. Her government is charged with the duty of protecting her own citizens, and the acts in question are a proper exercise of her discretion as to the manner of doing it. The constitution makes no distinction between different classes of aliens. The States may make such distinctions as they please. This court cannot supervise or regulate this exercise of discretion. It would be utterly incapable of ascertaining who might perhaps become paupers, or diseased, who rich and who poor. This must be done by local authorities, in the mode directed by State laws. I can, therefore, see no ground for the exercise of this power by the general government. It is a power of self protection reserved by the States.

The question as to the exclusive power of Congress over commerce, was fully discussed in the "License cases;" and I then expressed the opinion, and five judges held, that the power of Congress was not exclusive. The opinions then expressed are referred to, as fully disposing of the question.

But there has been no treaty or act of Congress produced which gives to all aliens a right to land in the States unconditionally. It would startle the States, if Congress is now to be held as having the whole power over the introduction of aliens into States. It would throw into hands of ship-masters power to bring and land just whom they pleased; for Congress has made no provision for any distinction between felons, paupers, or diseased persons. All whom the cupidity of the shipmaster may lead him to bring, must be landed and mingled with the citizens of the States, at his will, if the States may not regulate and control it. There is no conflict between any treaty or law of Congress and these acts of the State of Massachusetts. It imposes no tonnage duty, or tax upon commerce, but annexes a condition to the landing of pas-

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sengers, and regulates the terms upon which they may be admitted to enjoy the protection of the State.

If these laws are void, then the emancipated blacks of the West Indies, or free blacks from any quarter, have the free and uncontrolled right to enter the Southern States at their will, hire houses, and remain there without restraint by State laws. It can hardly be supposed that any rule by which such a consequence would follow was ever expected to be established by those who framed the constitution; and the States, in forming the constitution, never granted away their indisputable rights over the subject.

I shall not enter into an inquiry concerning the authenticity of the reported decision in the case of *New York v. Miln*. I have never regarded it as questionable. It was drawn up after the declaration of opinions by all the judges in a conference upon the case.

The opinion was read in open court without objection being heard, and we have never seen any dissent but that of Mr. Justice Story. The transportation of passengers is not a branch of commerce. The tax under the New York act was imposed not only to guard against the evils and burthens of foreign pauperism, but to aid in the reformation of juvenile delinquents. But notwithstanding this latter application of the money, the constitutionality of the statute is defensible on other grounds.

DANIEL, J., dissented, and expressed the greatest alarm at the consequences which would result from thus breaking down some of the most important rights of the several States, and declared that it was his solemn duty to put on record his most emphatic protest. The power of Congress over commerce is not exclusive, and the exaction of money from alien passengers, as a condition of their entrance into the States, is not a regulation of commerce, but is a tax which the States may justly assess upon

every person within their limits and jurisdiction. Passengers are not *imports*, in the meaning of the constitution, and no clause can be found in that instrument by which the States have granted to the Federal Government any power over the subjects of pauperism, or the admission of foreign immigrants into the States.

NELSON, J., dissented, but did not give an opinion at length.

WOODBURY, J., dissented. The laws are to be sustained on three grounds. (1.) The enactment of such laws is a proper exercise of the police power of the States.—(2.) It belonged to the States, as part of the sovereign power, to regulate the admission of aliens. (3.) It was part of the taxing power of the States. Whatever may be thought of the expediency of the particular details of the law, I have no doubt of the clear and unquestionable right of the States to enact such a law. The tax seems to be a legitimate part of the pauper regulations, and is not too large or unreasonable, considering the great amount of expense which foreign pauperism throws upon the citizens of the States. Paupers may be entirely excluded, and the Supreme Court has so repeatedly declared; and if this may be done, certainly conditions may be annexed to their admission. States may, indeed, impose any conditions upon any foreigners, paupers or others, as conditions upon which they may come into their limits, or exclude them entirely. This is an essential part of sovereign power, and has never been granted away by the States to the Federal Government. This has been exercised in one form or another, by more than half the States in the Union, and particularly in the slave States. Nor is there in the constitution any prohibition upon the States against doing what Massachusetts has done.—There are some prohibitions upon the States, but this is not among them. It is not a tax on imports. A passen-

ger is not an import, nor an article of commerce. Who is the importer, if a passenger is an import? He comes of his own volition, and is therefore his own importer, if he is imported at all. The power of Congress over commerce is not exclusive.

Judgment reversed in each case.

IMPORTANT DECISION IN THE TELEGRAPHIC CASE OF ALEXANDER BAIN AND S. F. B. MORSE.

The Chief Justice of the Circuit and District Court of the District of Columbia, to whom, under the laws of 1839 and 1836, the power is given to reverse or approve the decision of the Commissioner of Patents, has laid before the Commissioner his opinion in the case of Bain and Morse. The case was argued some weeks since, in Chambers.

The following paragraphs from the opinion of CRANCH, Ch. J. state the case and conclusion with sufficient precision.

* * There cannot be a patent for a principle, nor for the application of a principle, nor for an effect. Two persons may use the same principle and produce the same effect by different means, and without interference or infringement, and each would be entitled to a patent for his own invention, Godson, 63, 68, 74.

So in the present case, although the forms used by both applicants are the same, and the subject the same, yet as the effect is produced by means which appear to me to be so different as to prevent an interference, the question of priority of invention does not arise.

It is not a case, therefore under the 5th section of the act of 1836, but under the 7th section of the same act, so that

each of the applicants may have a patent for the combination which he has invented, claimed and described in his specification, provided he shall have complied with all the requisites of the law to entitle him to a patent.

If this were a doubtful question I should still think it my duty to render the same judgement, so as to give Mr. Bain the same right to have the validity of his patent tested by the ordinary tribunals of the country which Mr. Morse would enjoy as to his patent, and finally, to obtain the judgment of the Supreme Court of the United States upon it. For if the Commissioner and the Judge should reject Mr. Bain's application for a patent, the decision would be final and conclusive against him, unless he could obtain relief by a trial in equity under the 16th section of the act of 1836, and the 10th section of the act of 1839, which it is said, is doubtful.

I am, therefore, of opinion, and so decide, that Samuel F. B. Morse is entitled to a patent to the combination which he has invented, and claimed and described in his specification and drawings.

And that Alexander Bain is entitled to a patent for the combination which he has invented, claimed and described in his specification and drawings—provided they shall, respectively, have complied with all the requisites of the law to entitle them to their respective patents.

Supreme Court of Penn'a.--Eastern District--Phil'a.

ABSTRACTS OF DECISIONS.

MARCH 5, 1849.

The Commissioners of a District who are authorized to grade and pave a public street are liable for injuries accruing to a private right of way down which the water from the street is thereby diverted, for they are bound to make proper provisions for carrying off the waste water. *Commissioners v. Wood.*

The tenant or occupier is entitled to recover for the damages to his occupancy without regard to his title, and a recovery in such action will bar all others for the same cause. *Ib.*

An offer to construct a culvert for the purpose of carrying off the water—rejected by the plff. is a bar to a recovery for any injury which would thereby have been prevented. *Ib.*

Consequential injuries to property to which a private alley is not appurtenant, are inadmissible in an action for a nuisance, destroying the use of the alley. *Ib.*

A plan of the District of Kensington under the act of incorporation is complete on its approval by the Court, though it be not recorded pursuant to the act. *Ib.*

And proceedings in the Quarter Sessions assessing damages to the plaintiff, by reason of the opening of the alley laid out on the plan for public use, is evidence of a lawful taking for public use, although it is not shown that the damages have been paid for it. *Ib.*

Where a will is written on several sheets of paper fastened together by a string, proof by two witnesses of the signature of testator at the end thereof, is sufficient under the act of Assembly. Whether all the sheets were attached at the time of the signing, or whether there has been a subsequent fraudulent addition, is for the jury, as in ordinary cases. *Ginder v. Farnum.*

The waiver of protest by an endorser on the day of the maturity of the note, puts him in the same situation as if protest had been made and proved, and there being no contradictory evidence it is proof under the act of Assembly of demand and refusal and notice. *Scott v. Greer.*

Evidence of the contents of a placard posted up in a bank—offering to make collections on certain terms, is evidence where the President after notice to produce, fails to account for it, in an action against the bank for

negligence in failing to make a collection—without proof that the plaintiff read it or acted upon it. *Wingate v. Mech. Bank.*

Parol evidence admissible to explain the meaning of short entries in a bank book, in an action against the bank. *Ib.*

Where a bank received for collection a note payable in another State, under an agreement to collect it for seven per cent., and neglects to give information of non-payment and to return the note to the depositor within a reasonable time, they are liable to an action. *Ib.*

And if at the time of the trial the note is barred by the statute of limitations, and the bank has never until then returned it to the depositor, and there is no evidence of the insolvency of the maker, the measure of damages will be the amount due on the face of the note with interest, less the 7 per cent. for collection. *Ib.*

Where under a count for negligence in not collecting, the case has been tried on the merits and the recovery was on the ground of neglect to inform the depositor of the non-payment, and to return him the note, the variance cannot be objected in error. *Ib.*

MARCH 6.

Though a will and the codicils form but one testament and speak from the date of the last codicil, yet they constitute distinct instruments and a bequest by the will of the residue "to the legatees," will be confined to such legatees as are therein named and to such legatees as are substituted by codicil for some of them. *Alsop's Appeal.*

Where testator re-publishes his will and the codicils, and in the attestation styles them codicils—they do not thereby become part of the will but remain codicils. *Ib.*

Testator by his will gave certain pecuniary legacies, and directed the residue if there was one, to be divided pro rata among the legatees in the proportion their legacies bore to the residue. By subsequent codicils he gave legacies to other persons. Afterwards he made a copy of the original will and of the several codicils, retaining the original dates and separate executions, and re-executed and re-published the same with the several codicils—*Hell*, that the codicil legatees, excepting those substituted for the legatees in the original will, were not entitled to share in the residue—but that it was to be divided exclusively among the legatees named in the will and those substituted for some of them by codicils. *Ib.*

Testator by a codicil bequeathed to various legatees certain amounts "5 per cent. C. stock now in my possession—likewise of said stock—of said stock—of C. stock, and the balance 4,000 to A"—which amounted in the whole to \$69,000. At that time he held but \$64,000 of C. stocks, Subsequently he parted with a portion of the stock—the legacies are pro tanto adeemed. Subsequently to the transfer of the stock by him, he re-

cited that there were sundry memoranda of bequests to the families of A. (some of whose children were among the stock legatees) and of B. the particulars of which he did not recollect but which he confirmed and charged on his estate in the same manner as if therein stated. Held, that the adeemed legacies were not thereby revived; the codicil giving the stock legacies being the only memorandum which could be found. *Ib.*

By a separate codicil of same date he recited that he believed he had made further provisions in the memoranda referred to for the family of A., if not, he bequeathed to each of her children by name \$5,000. In his previous will he had bequeathed to A. a legacy for life remainder to her daughters. Held, that these legacies were conditional—that testator showed—by provisions for “the family of A” he meant her children, and that only such of them as were not provided for in the codicils not then before him were entitled to the legacies of \$5,000 each. *Ib.*

Testator having by his will given a legacy to A. by codicil reciting the death of A., bequeathed the sum intended for A. to C. C. is thereby substituted for A. and becomes entitled to share in the residue under a bequest thereof to the legatees in the will. *Ib.*

Where a legacy is given in trust for A., for life remainder over, A. is not entitled to the possession of the legacy.

MARCH 9.

A master of a vessel in a port of refuge is not justified in selling the cargo as damaged, by showing that he acted in good faith, and under the advice of surveyors called by him: who recommended a sale for the benefit of all concerned—if it be shown that no necessity existed for the sale. *Myers v. Baymore.*

A certificate of discharge in bankruptcy is no defence to an action for rent accruing under a demise for years, after a decree of bankruptcy and before discharge. *Prentiss v. Kingsley.*

A. & B., partners as commission merchants, received goods on consignment for sale. B. died and A. sold the goods and became a certificated bankrupt. The executor of B. is liable to the consignor for the proceeds of the goods. *Heberton v. Jepherson.*

Unless the contrary appear, additional counts are presumed to have been filed by leave of the court. *Ib.*

MARCH 12.

Twenty years adverse user of a way under claim of right, is sufficient to authorize a presumption of a grant. And that it was adverse may be presumed if the user was notorious and in the ordinary manner and not under circumstances showing it to have been by leave and favor or by the courtesy of the owner. *Estling v. Williams.*

A compulsory non-suit under the statute is no bar to another proceeding for the same cause. *Bournonville v. Goodall.*

Where plaintiff in a sci: fa: on a mechanic's claim has been non-suit-
ed, he may file another claim for the same demand and proceed thereon,
though the former claim remains on the records of the court. *Ib.*

MARCH 14.

A. having mortgaged land to secure his bonds, conveyed the land to B.
who agreed to pay the mortgage debt and interest. B. having failed to
pay the accruing interest, it was paid by A. and receipts endorsed on the
bond. A. then purchased the bond and mortgage and took an assignment
in the name of a trustee. On a sale of the land by the Sheriff he is en-
titled as against a subsequent judgment creditor of B. to receive from the
proceeds, the principal of the mortgage debt, together with the interest
he had paid, which B. had agreed to pay. *Morris v. Oakford.*

MARCH 15.

A new promise by one partner takes the case out of the statute as to
all. It need not be specially replied, though it was to pay in one, two
and three years. *Oakley v. Keerl.*

The Orphan's Court on an application for the distribution of a balance
in the hands of an administrator cannot take cognizance of a disputed
claim by the administrator personally on one of the distributees. *Carter's Appeal.*

Where the Sheriff under a liberari delivers possession of premises held
under a lease for years, he should return that fact specially. A return
that he had delivered possession without more, renders him liable for a
false return. *McMichael v. McKeon.*

The right to reimbursement for a party wall is personal to the first
builder, and does not pass by his grant of the lot, house and appurtenan-
ces. *Todd v. Stokes.*

MARCH 19.

In an action against a Sheriff to recover the penalty for taking fees for
services not compensated by the act, it is sufficient to aver that they were
taken for services other than those provided for by the act, without speci-
fying for what alleged services they were demanded. *Overholtzer v.*
McMichael.

Where the defendant's counsel in a proceeding before an alderman,
admits a letter to be genuine, the hand writing need not be proved on an
appeal. *Ib.*

A foreign attachment against A. was served on B. as garnishee, after
which A. acting as agent for third persons, deposited cash in his own
name with B., and also procured B. to purchase on discount drafts drawn
by him in his own name, though in fact as agent, which were paid by his
principals. A. drew out the funds by his checks and applied them in the
business of his principals. B. is liable to the attaching creditor, although
the jury found that all the funds were deposited and drawn out by A. as
agent for others. *Jackson v. Bank of U. S.*

In a scire facias against a bank, garnishee, in such case, the cashier is a competent witness for defendant, although the money was paid out on A's checks by his direction. *Ib.*

On writ of error taken by plaintiff in foreign attachment, to proceedings against the garnishee, the Court cannot notice an alleged error in a judgment for plaintiff, on plea of mul tiel record to the scire facias against the garnishee. *Ib.*

A sale of a lot by a plan on which a public street is laid out as one of the boundaries, and a conveyance describing the lot as a lot on W. street as the same shall be opened; and bounded on the south by W. street, does not create a covenant on which the grantors are liable where the street was subsequently vacated by Legislative authority, and the grantor entered upon and occupied the land over which it was laid out. *Bellinger v. Union Burial Ground Soc.*

If defendant in his prayer for instructions sets up a broader right than he is entitled to, the judge should not deny it altogether, but should explain to the jury the true extent of his right. *Amer v. Longstreth.*

Where parties have entered into an amicable action to try their respective rights to a division wall, part of which has been wrongfully used by defendant: it is error to instruct the jury that if there had been a wanton invasion of plaintiffs rights, they were not confined to the actual damage done. *Ib.*

Testator bequeathed one share of his estate to his wife, and two shares to the use of his son, an infant, and directed if his son should die, the shares bequeathed to him should be kept invested for fifteen years after testators death, and if his wife remained a widow then paid to her, but if she married or died within that time, to his sisters. The son dying in his minority more than fifteen years after testators death, his administrator is entitled to the legacy. *McGuigan v. Christy.*

Errata and Omissions of the Printer in Abstracts Published in the March Number.

January 22, line 1, for "a ship"—read "a general ship."

Do 26, line 1, dele "first."

Do do 7, for "is evidence" read—"is not evidence."

Page 425, line 16, for "an account which" read—"an account with the same parties which"

Page 425, line 17, 18, for "of such bonds, coupons entitling to"—read "of such bonds and of coupons entitling the bearer to"

Page 425, line 20, for "or" read "on"

Page 427, Feb. 8, 4 line, for "Error" read "Record."

Do Feb. 12, last line, to read thus—"my wife one part; to each child one part; my mother-in-law to live, &c."

Page 428, line 2, for "the" read "two"

Do 3, for "partuer" read "partners."

Do 3, for was "a company" read "was A. and company."

Page 428, Feb. 19, line 14, for "devise even" read "devise over," after codicil—read "and."

New Publications.

Denio's Reports of the Supreme Court of New-York.—We have just risen from the perusal of the 4th volume of these Reports, published by Gould, Banks & Gould, Albany; and Banks, Gould & Co., New-York. The style in which the work is presented to the public, needs no commendation. But we desire to gossip with our readers concerning the work and its contents. Nearly a quarter of a century ago, while sojourning at Saratoga Springs, we occasionally visited the law office of Judge Cowen, and the printing office of G. M. Davidson, and were treated with great civility by these worthy citizens. Our distinguished friend Judge Cowen has left this world, but he has left a high reputation behind him. Our friend Davidson, we are glad to perceive, by the imprint on the volume before us, is still alive and busily engaged in making excellent impressions for the benefit of mankind.

This volume contains many interesting decisions. The celebrated case of *Freeman v. The People*, settling many interesting questions relative to the trial of insanity, is the first case in the book. In *Abbott v. Draper*, p. 51, it is held that money paid on a *parol* contract, void by the statute of frauds, cannot be recovered back, on that ground, if there has been no breach by the other party. In page 97 it is decided that an action may be maintained by a person, *not a party to a contract*, on a promise made, upon a valid consideration, to another person for the benefit of the plaintiff, and that such promise may be declared on either according to the facts, or according to its legal effect, as a contract with the plaintiff. In *Deyo v. Stewart* p. 101. the law regulating trespasses of cattle over insufficient fences is treated of; and in *Lyke & Dumond v. Van Leaven*, p. 127, there is some learning to show how far the owner of swine is answerable for their trespasses in viciously injuring a neighbor's cow. In *Stearns v. Marsh*, p. 227, the rights of pledger and pledgee of personal

property are discussed, and the manner in which the creditor may enforce payment of his claim by disposing of the *collaterals* deposited with him, is prescribed with great particularity. In *More v. Howland*, p. 264, it is held that the *bona fide* sale of one's credit, by way of guaranty, for a compensation over 7 per cent., is not usurious. In *Silbury, et. al. v. McCoon, et. al.* p. 332, it is held that the owner of *corn* cannot sustain an action of trover for the *whisky* into which it was manufactured by another without authority from the owner; that the property is thereby so changed as to lose its identity, and that the question, in such case, does not depend upon the wrongful motives of the trespasser. In *Corning v. Ashley et. al.*, p. 354, it is held that a book account containing *only a single charge of goods sold to the defendant* is not evidence, where there had been no regular dealings between the parties. In *Whitney v. Hitchcock*, p. 461, the practice of allowing exemplary damages, in actions of tort, seems to receive some restriction. We are pleased to see in p. 65, that after a few vigorous exertions, the law of New York is restored to its primitive purity in regard to the rule, in demurrer, to give judgment against the party who committed the first fault in pleading. There seems also some change for the better in *The People v. John Erwin and Mary Ann Clark*, p. 129, in which the case in 2 Hill, 558, is *explained*, and it is now held that one who demises a house with intent that it be kept for purposes of prostitution, and derives a profit from that mode of using the property, is liable to indictment for the misdemeanor. But we are distressed to perceive, from the facts disclosed in *Wait v. Day*, p. 439, that the want of religious instruction "at Sandy Hill," is still a serious grievance, and that a former cashier of the "Washington and Warren Bank" applied his funds in detriment of his creditors, to an object which was not sanctioned by the Supreme Court. BRONSON, Ch. J. holds that "a purchase made by way of gift, or advancement to a mistress, *although it may not look to future co-habitation*, cannot be supported. Creditors have a higher and better claim than such a woman." It is scarcely necessary to say that the cashier referred to was not the gentleman who lamented the want of "stated preaching."

In *Piper v. Elwood*, p. 165, the Court maintains the doctrine that a sale on execution of personal property which is afterwards recovered from the plaintiff by the defendant, as not liable to execution, is not a satisfaction *pro tanto*. This is certainly in accordance with justice; although it does not altogether square with the Pennsylvania case of *Caldwell v. Freeman*, 10 Watts 9.

REPORTS OF CASES argued and adjudged in the Superior Court and Court of Errors and Appeals, of the State of Delaware, from the organization of those Courts under the amended Constitution; to which are added select cases from the Courts of Oyer and Terminer and General Sessions. Published at the request of the General Assembly. By Samuel M. Harrington, one of the Judges of the said Courts.—Vol. IV. Dover: Printed by S. Kimney. 1848.

We have received this volume of Reports from our sister State, and looked through it. There are several cases that deserve the attentive consideration of the profession; they cover important points; apply general principles to grave interests; and are in every respect worthy the confidence of the community, and highly creditable to the learned and conservative court which pronounced them. Thus, *Hall v. The State of Delaware*, p. 132, 154, is unquestionably sound common law. Some of the cases attract our notice as they exhibit a different phase of society from our own; thus:—*The State v. George Platt*, p. 154, gravely decides that persons appointed by the State to manage a *lottery* for the benefit of a College, are *trustees* and not *public officers*.

So *Redden v. Spruance*, p. 217, where it is held that State proprietors are liable to the master of a slave for taking him as a passenger, *knowing* him to be a slave, and thus aiding his escape.

And they are bound to inquire with due *diligence* into the condition of colored passengers.

We notice that the Superior Court have adopted as a general rule substantially our affidavit of defence law—vide p. 209.

The Smyrna Steamboat Co. v. Whilldin p. 228, is an interesting case on the law of collision on water. The most important and most interesting case in the book is *Bailey v. The Philadelphia, Wilmington and Baltimore Railroad Company*, p. 389. We have heretofore seen this case. The learned Judge who delivered the principal opinion was kind enough to send a copy to the editors of this Journal, in sheets, for which we take this occasion to thank him. It was too long for our columns or we should have printed it at that time. And we now refer to it with much pleasure and are glad to have an opportunity to call professional attention to the sound, constitutional views so elaborately argued, and so worthily set forth and considered by the learned Judge. So much professional and popular ignorance, as well as prejudice, exists on the subject-matter here in controversy that any Judge who carefully considers and deliberately decides the grave questions of the Constitutional rights of great public corporations on which their value depends is a public benefactor. This opinion alone gives this volume great value and general importance.

The case of *Rice v. Foster*, p. 479, is a well considered and important one. It discusses the subject-matter of licenses to retail intoxicating liquors under acts of the Legislature. This topic is now attracting professional attention, and may be considered together with the *Massachusetts* and *Pennsylvania* decisions.

The *State v. Buzine*, p. 572, is a good case on the subject of extradition.

On the whole this is a most excellent volume of Reports, highly creditable to the judiciary, the State and the Reporter.

REPORTS OF CASES argued and determined in the Superior Court of the city of New York. By the Hon. Lewis H. Sandford, one of the Justices of the Court. Volume 1. New York: Published by Banks, Gould & Co., Law Booksellers, No. 144 Nassau street, and by Gould, Banks & Gould, No. 104 State street, Albany. 1849.

We have scanned this volume of Reports with some care, and are well satisfied with the Reporter's part of the work.

In order to understand the true value of the Reports, the character and jurisdiction of the Court must be stated to the reader: this is well set forth in the publishers' preface a part of which we present:—"It (the Court) has jurisdiction of all actions, in which, either the subject matter is within the city, or the parties are there served with process. Under the Judiciary Act of 1847, and the Code of Procedure, this jurisdiction extends to equitable, as well as legal actions. By both of these statutes, its decisions are subject to review in the Court of Appeals, and are removed directly thither for that purpose. Thus, in the city of New York and in respect of parties there served with process, although residing elsewhere, the Superior Court is in point of civil jurisdiction, on the same level with the present Supreme Court of the State.

Formerly, when its judgments were reviewed in the late Supreme Court, and when it had no equitable jurisdiction, it became, and for nearly twenty years was, the principal commercial Court in the city. Probably no single legal tribunal in the United States, has within that period passed upon as many important questions of commercial law, or upon suits involving so much property, as has the New York Superior Court. From its elevated character, its situation in the American Metropolis of trade and commerce, and its enlarged jurisdiction; it is believed that faithful reports of its decisions, will be an advantage to the bar, not only of this city and State, but of the whole country. The bar of New York has long expressed a desire for such a publication; and Judge Sandford

having, for a time, in addition to his arduous duties on the bench, undertaken the labor of preparing them, the publishers are confident that the series of reports now offered, will command the approbation of the profession, both for their entire accuracy and their intrinsic merit.

The publishers' commendation of these reports are strictly and literally correct. Judge Sandford has thoroughly and carefully performed his duty, and it affords us much pleasure to call professional attention to his labors.

It appears that Judge Oakley's opinions were generally orally delivered, but had this fact not been stated, it could not have been ascertained from a perusal of the book. They appear to be fully and accurately set forth and stated.

The publishers have printed their book in a becoming style, and the typographical and general execution is such as will commend itself to the profession.

UNITED STATES DIGEST; Being a Digest of the Courts of Common Law, Equity and Admiralty, in the United States. By John Phelps-Putnam, of the Boston Bar. Vol. 1. Annual Digest for 1847. Boston: Charles C. Little and James Brown. 1848.

We have been much pleased by the careful study of some of the titles in this volume.

It is the first of the Annual series which is to be continued by a similar volume every January.

Works of this kind are indispensable to the profession in this country where no professional emoluments will justify one in the purchase of many of the volumes of Reports which the press is continually sending forth. The Reports of twenty-two out of the thirty States, together with Howard's S. C. Reports and United States Cir. Court Reports are here digested.

This volume is also a supplement to the former United States Digest embraced originally in three volumes; to which two additional supplemental volumes were added; all of great value to the profession as the finger guides to the cases. We have heretofore noticed the Supp. to U. S. Dig. (7 Penn. Law Jour. 341) and see no reason to change our views as there expressed.

A well prepared table of cases covering one hundred and twelve pages is not the least valuable portion of the editor's labors. We commend this greatly and trust that we shall never again be offended by a Digest without a table of cases.

We are informed that the defect in the other volumes is to be remedied soon, as a carefully prepared table of all the cases digested is now in press.

Messrs. Little & Brown deserve the thanks of the profession for their costly and well printed Digests, and we trust they may be amply repaid for all their outlay of capital and labor.

It is scarcely necessary to add that the typographical execution sustains the reputation of the publishers.

The Western Legal Observer.—This is a new and valuable periodical, published at Quincy, Illinois, under the editorial supervision of Charles Gilman, Esq. Mr. Gilman is favorably known throughout the United States. He was, until recently, one of the editors of the Western Law Journal. He is the author of Gilman's Digest of the decisions of the Supreme Courts of Illinois and Indiana and the United States Circuit Court. And the 4 volumes of Gilman's Reports of the decisions of the Supreme Court of Illinois are presented to the profession in a style which commends the talents and industry of the reporter to the favorable consideration of the profession in his new labors. The Western Legal Observer is well conducted and is published at the very low rate of two dollars per annum.

THE NEW LIBRARY OF LAW AND EQUITY. Edited by Francis J. Troubat, Esq., Hon. Ellis Lewis and Wilson M'Candless, Esq. Vols. 12, 13 and 14. M'Kinley & Leasure. Harrisburg. 1848.

The 12th and 13th volumes of this work are bound in one, and contain the exceedingly valuable Digest of William Tarn Pritchard, one of the Proctors of the Ecclesiastical and Admiralty Courts in Doctors' Commons. This Digest has been noticed in a former number of the Journal.

The 14th volume contains, as far as letter K. of The Law Lexicon, or Dictionary of Jurisprudence, explaining all the technical words and phrases employed in the several Departments of English Law, with an explanatory as well as literal translation of the Latin Maxims contained in the writings of the ancient and modern Commentaries. By J. J. S. Wharton, Esq. of the Middle Temple, Barrister at Law, &c.

The value of the selections from the latest English publications, and the handsome style in which the publishers present the work to the public, commend the New Library of Law and Equity to the favorable consideration of the profession.

THE
AMERICAN LAW JOURNAL.

MAY, 1849.

ELECTION OF JUDGES.

The following communication, on the subject of the proposed amendment of the Constitution of Pennsylvania, has been furnished by an eminent member of the Bar of that State. The friends of an Elective Judiciary have a right to be heard, and the article is published as a matter of interest throughout the United States. When the Judges derive their authority immediately from the people, and can take an appeal to the same paramount power, the fear of removal by address for resisting Legislative usurpations will no longer exist, and we shall probably hear less of the validity of retrospective acts destroying vested rights—of legislative reversals of Judgments without notice to the parties—and of other usurpations of Judicial power, under the new definition of *law*, that it is “a rule *postscripted*” instead of being “a rule *prescribed*.” It is a prevalent opinion that the present Judicial tenure has failed to secure either the independence of the Judiciary or the rights of the people.

[*Ed. Am. Law Jour.*]

The principle of electing Judges has been incorporated into the Constitutions of several of the States of the American Union; and the most important act of the last session of the Legislature of Pennsylvania, was the passage of a joint resolution, by a decisive and significant
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majority, to amend the Constitution of that State so as to give to the people the election of their Judges. That it will become a part of the Constitutional law of Pennsylvania, as soon as the machinery for effecting it will admit, there cannot be a rational doubt. It is part of "the stream of human opinion *in omne volubilis ævum*, which the accession of every day will swell, and which is destined to sweep into the same oblivion the resistance of learned sophistry, and of powerful oppression." The tendency is everywhere to give to the people the election of all their officers,—to make government, in all its departments, emanate immediately from the people,—and the doctrine that the officers of the Judiciary should form an exception to the general rule, is daily losing ground, and will soon be entirely exploded.

That this reform should excite the fears of the timid, and the opposition of the interested, is quite natural: for such is the fate of every proposition to disturb the settled order of things, or to interfere with the tenure and emoluments of placemen, no matter how necessary it may be to the real interest of the people. Previously to the adoption of the present amended Constitution of Pennsylvania, the same classes of persons indulged in the most gloomy vaticinations of the evils, especially in relation to the change in the judicial tenure, which it would bring on the State. Their doleful forebodings have not been verified; and no one now thinks of going back to the *ancien regime* of life offices. On the contrary, the popular demand is for more thorough reform in the tenure of judgeships.

This reform will also be opposed by some of the members of the Legal Profession. The education, habits of thought, and professional practice of lawyers, are calculated to make them ultra conservative; and it must be confessed that, unless the effects of the studies and practice of their profession be counteracted by other liberal

studies, they are in no little danger of becoming bigoted and intolerant in regard to all changes in law and government. Their researches are not directed to the discovery of what *ought* to be, but of what *is held* to be the law in any given case ; and in their practice they put their trust and confidence in established forms and precedents.— Hence they are liable to adopt the creed, that “ what is, is right.” Yet their views are not so “ cabin’d, cribb’d, confined,” as the nature of their professional studies and pursuits would lead one to suppose. On the contrary, lawyers are among the most liberal men in the community. They are too well read, and have too great a share in the literature of the day,—they are too well acquainted with the wonderful revolutions which science is daily producing,—they mingle too much with the men of their times,—and they are too familiar with the advances and improvements which are made in the arts and in politics, not to partake of the progressive spirit of the age ; while their professional education and habits act as a salutary check, and prevent them from being hurried into excesses and extravagances. Such men are not likely to think that, while every other human contrivance is capable of improvement, the present judicial system of Pennsylvania is fixed at the point of perfection. Like the eminent and learned men, who have undertaken the work of legal reform in the State of New York, and the great number of able lawyers throughout that State, who have given their countenance and support to that reform, they will redeem their profession from the charge of illiberality and contractedness. Still there will be some lawyers, who, from having grown old under the system of judicial appointments, and having thus contracted inveterate prejudices against changing it,—from constitutional temperament,—or from too exclusive an attention to the routine of their professional reading and practice,—can see nothing but

evil in the proposed change. And there may be others who are weak enough to think that it smacks of the Aristocracy of professional caste to debar the *profanum vulgus* from all participation in the selection of Judges.

It is too late in the day to oppose this reform by canting about the danger of changing the Constitution, and about the "radicalism" of electing Judges. The cry of danger from altering State Constitutions, has been too often raised, and too often falsified, to create much alarm. Almost every day affords additional evidence of the confidence that can be reposed in the honesty and intelligence of the people, when left to decide questions of the greatest moment. Each day furnishes fresh proof of their ability for self-government, and of their unwillingness to adopt any notions that are really wild and extravagant. And the term "radicalism" has been applied to too many changes in law and politics, which turned out to be salutary improvements, to retain much of its original power of exciting alarm. Besides, the proposition to make Judges elective has received the approbation and support of too many conservative men to afford a pretext for calling it radical. It can be opposed only by reason and argument.

What are the arguments that are urged against an elective Judiciary? It is said that the people are not as competent to select their Judges as they are to select the equally important officers whom they now elect. This is denying the fitness of the people for self-government, in a very important particular. Yet, if true, it is a valid objection. But, is it true? Are not the American people as well acquainted with the nature of the duties of a Judge, as they are with those of a Congressman or Governor? Nay, are they not better acquainted with the duties and qualifications of a Judge, than they are with those of the Executive and Legislative offices? Comparatively but few

of the voters in this country ever see the State or National Legislatures in session, or the State or National Executive execute the functions of their offices, or are acquainted with the candidates for those important places. But from their habit of attending the Courts, as parties, jurors, witnesses, and spectators, they have a much better idea of the traits of character, and sort of talents, which fit a man for Judge than they have of those which qualify him for the other offices mentioned ; and from what they see in Court, as well as from their business relations with members of the Bar, from whom the candidates for Judgeships will be taken, they are much better qualified to vote for a man for Judge, than they are to vote for a man whom they never saw, and who is a candidate for an office, the functions of which they never saw exercised. Besides, the competency of the people to form an opinion of the qualifications of a Judge, their interest in his selection, and their right to be heard on the subject, are practically admitted under the old system. This is evidenced by the eagerness with which their signatures to petitions for, and remonstrances against, the appointment of candidates are sought, whenever there is a contest about it. If the will of the people is to be ascertained at all, the proper method is to ascertain it through the ballot boxes.

It is objected that it would degrade the judicial office, and taint the purity of the administration of justice, to allow candidates for judgeships to enter the political arena and canvass for votes. But under the old system, candidates do enter the political arena. As things are, lawyers are not likely to "have greatness thrust upon them," in the judicial line, nor, indeed, in any line. In these office-seeking times, the modest student and the learned recluse rate low in the political market. A lawyer whose ambition lies in the direction of a judgeship, takes the stump to secure the election of a Governor who will

bestow it on him. The election gained, he claims the appointment as the reward of his services. It cannot be pretended that, when he is impelled by personal ambition but covers it under the pretence of laboring for the success of his party, he will be more restrained by considerations of decency and propriety, than when he is avowedly a candidate for an office, among the qualifications for which, dignity, honor, and honesty are considered indispensable. But candidates for judgeships do often canvass for the "sweet voices" of the people, and under circumstances more calculated to affect their partiality, than if they were elected immediately by the people. It is not easy to understand that it is more degrading to canvass for votes than for signatures. There is certainly less sacrifice of dignity, in becoming a candidate by being placed on a ticket by a nominating convention, and being voted for along with the other candidates on the ticket, than in taking the field alone, and being supported on personal grounds. Under the system of appointments, the contest is between aspirants, of the same party, and is therefore personal, and consequently more bitter—excites more malignant passions, and creates stronger friendships and more intense hatred, than when it is merely political. In an election, any particular candidate is hid in the crowd, and his importance is merged in that of the whole, and lost sight of in the excitement of the political struggle. But under the system of appointments, each applicant stands out in bold relief, and all is personal. The man who carries round a petition, or in any other manner takes an active part for an applicant, renders him a personal service, and lays him under a personal obligation; and, on the other hand, the man who is active in opposing his appointment, is considered and treated as a personal enemy. The man who pins up in his bar-room a petition, and procures to it the signatures of the loafers

who there "most do congregate," has a much stronger claim on the Judge for a license, than if he had supported him with twenty others on the same ticket, on political and not on personal grounds.

There have been, it is freely conceded, many judicial appointments made at the unanimous request of the Bar and the people of the districts, which reflect credit on all concerned in procuring them. But there have been instances in which the system of appointments has operated as here represented; and that the two systems—that of appointments and that of elections—are calculated to operate as here represented, few unprejudiced and candid observers of political events can doubt, although they may, from a hatred of innovation, or a distrust of the intelligence and competency of the people, still prefer "the old paths."

Q.

[From the Western Legal Observer.]

Supreme Court of Illinois, December Term, 1848,

AT MOUNT VERNON.

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* ALBERT G. CALDWELL, *v.* JOHN REYNOLDS.

Motion for a peremptory Mandamus.

The General Assembly passed a law providing for the division of a county and the formation of a new county from the same territory, to take effect on a majority of the votes being cast for such division: *Held*, that the law was not unconstitutional.

The General Assembly derives its powers from the people, subject only to the limitations and restrictions of the Federal and State Constitutions.

The Acts of the General Assembly are not necessarily absolute, but may be so framed as to depend upon some future event or contingency for taking effect.

Although the legislature may not divest itself of its proper functions or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly, or advantageously do itself.

Motion for a peremptory mandamus to John Reynolds,

Recorder of Deeds for the county of Gallatin and State of Illinois, to require him to enter upon the records of said county certain deeds tendered to him for that purpose by the Relator in this case. The motion was predicated upon certain facts set forth in the petition of the Relator, which are substantially as follow :

That on the first Monday of August, 1847, Gallatin county was included within certain limits defined by law and so recognized ; that by an Act of the General Assembly, approved January 26, 1826, the county seat was located at Equality : that on said first Monday of August, there was an election for public officers of said county, and among them a Recorder ; that at such election, one John Reynolds was duly elected for the term of two years, &c., and was subsequently commissioned and qualified, and performed the duties of said office at said Equality ; that by virtue of an Act of the General Assembly, entitled "*An Act to divide the county of Gallatin and to form out of the same the county of Saline,*" approved Feb. 25, 1847, the electors of said county, by a vote upon the question, cast a majority of their votes in favor of the division of the county, and the said John Reynolds, then being such Recorder, fell within the limits assigned to Gallatin county by the provisions of said Act.

The petition then went on to allege that said Act was unconstitutional and void, and that said Reynolds continued to be the Recorder of the original county of Gallatin, not having resigned his said commission ; that the Relator, believing him to be the proper Recorder of said original county, presented certain deeds (describing them,) to him for record, concerning certain lands lying within the limits of said original county, and within the limits defined by said Act as the county of Saline ; that said Reynolds refused to receive and record said deeds, as requested.

The Respondent answered the petition, and stated that the Relator exhibited to him his petition for a *mandamus* and notices of his intention to move for the same, addressed to and served upon the counties of Gallatin and Saline by filing the same with the acting clerks of the County Commissioners' Court; that he waived all preliminary process in the case, and entered his appearance accordingly, and submitted the question in controversy to the decision of the Court, in the same manner as if an alternative *mandamus* had been issued.

The facts stated in the petition were admitted by Respondent, but he further alleged, that on the day of said election, Shawneetown received a majority of the votes for the county seat of Gallatin, as divided; that the Respondent retained his office at Equality, the old county seat, awaiting the direction of the law; that the County Commissioners' of said Gallatin county thus newly formed, on the third day of October, 1848, vacated said Respondent's office and ordered a new election of Recorder for the county thus formed; that, at such election, he was elected Recorder of such county, but had not as yet qualified, nor acted as such, or resigned his original commission; that the order aforesaid vacating said office was prior to the presentation of the deeds aforesaid for record; and finally, that in consequence of all these proceedings, he was embarrassed and undecided as to what course to pursue, and therefore declined to record said deeds as requested by the Relator.

H. W. Moore and A. G. Caldwell, for the Relator.

T. G. C. Davis, for the Respondent.

The Opinion of the Court was delivered by CATON, J.

The law, the constitutionality of which is questioned by this application, provides for the division of Gallatin county, incorporating a part of its territory into a new county, called Saline. The Act goes on in detail, with all

the various provisions necessary to effect the change, and then, in the tenth section, provides for an election, authorizing the people of that county to say, by their vote whether they wished the division or not, and that the law should only go into operation in the event that a majority of the voters at such election desired a division.

To establish the unconstitutionality of this Act it is assumed, that instead of being a law finished and obligatory from the hands of the General Assembly, this is merely a bill prepared by that department of the Government, and submitted to the people of Gallatin county, to be by them passed into a law, or defeated at the polls. This assumption is not true in fact. The law, as passed, was complete and perfect, although its principal provisions were to take effect upon a contingency, the determination of which did not depend upon the exercise of legislative powers by the people; but upon an expression which they were authorized to make, rather in the execution than in the enactment of the law, an expression to be made in a legitimate and an ordinary way. To the General Assembly have the people delegated the legislative powers of the Government, only limited and controlled by the Federal and State Constitutions, and it is insisted that these powers cannot be delegated to any body of men or any portion of the people, upon the principle that delegated powers cannot be delegated. This maxim is true, unless the delegate is empowered to employ others. The extent to which this maxim should be applied to a legislator depends upon a proper understanding of legislative powers; upon a proper determination of what may legitimately be done in the exercise of those powers. It is easy to say that it is the business of the legislature to make laws; but then we must inquire, what kind of laws may be made? Must they be full, complete, perfect, absolute, depending upon no contingency and conferring no discretion? This

would be absolute legislation, exhausting legislative power on the subject matter of the law. We presume that no where has constitutional learning advanced so far as to assert this doctrine. For ourselves, in determining what is legitimate and proper legislation, we feel warranted in looking at the past to see what kind of laws legislative bodies have been in the habit of passing. Legislative power is not a new idea only sprung into existence at the formation of this republic, but it has been known and understood since the formation of society and the institution of civil governments; and its meaning is not changed by its introduction into the American Constitutions, although its exercise is there limited, restricted and controlled, as well by their express provisions as by the genius of the governments of which they are the fundamental laws. If we take the action of all past legislators as determining what may and should properly be done in the exercise of legislative powers, we see that while they are bound to make the laws, yet those laws need not be absolute, nor make every provision for doing that which they may authorize to be done. While all must be done under their sanction, yet they need not do all, nor command all. A law may depend upon a future event or contingency for its taking effect, and that contingency may arise from the voluntary act of others. Of this class are all laws creating private corporations, and a very large proportion of the laws creating public or municipal corporations. The former must necessarily be submitted to the corporators for acceptance before they take effect, and this has been very usually done with the latter, especially in the incorporation of towns and cities, and not unfrequently of counties; and we have never heard it questioned before, that the legislature might properly submit a law, creating either a private or a public corporation, to the acceptance of the corporators. All such

laws are perfect and complete when they leave the hands of the legislature, although a future event shall determine whether they can take effect or not. If we say that this is an unauthorized delegation of legislative power, we forget what is a proper and legitimate exercise of that power. If the saying be true, that the legislature cannot delegate its powers, it is only so in its most general sense. We may well admit that the legislature cannot delegate its general legislative authority; still it may authorize many things to be done by others which it might properly do itself. All power possessed by the legislature is delegated to it by the people, and yet few will be found to insist, that whatever the legislature may do, it shall do, or else it shall go undone. To establish such a principle in a large State would be almost to destroy the Government. The legislature may grant ferry licenses, or it may lay out roads and specify their metes and bounds, and yet, who will doubt that it may delegate this power to others, either by general or special laws? So, also, it may pass all the laws requisite for the government of a particular city or township, or school district, and who will doubt the propriety of its authorizing this to be done by the people within the limits of the city, town or district, by their local representatives, or even directly. This is making laws, and laws, too, of as binding efficacy as if passed directly by the legislature. They are dependent upon the legislature for their vitality and force. Necessarily, regarding many things, especially affecting local or individual interests, the legislature may act either mediately or immediately. We see then, that while the legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously do itself.—Without this power, legislation would become oppressive,

and yet imbecile. Local laws almost universally call into action, to a greater or less extent, the agency and discretion, either of the people or individuals, to accomplish in detail what is authorized or required in general terms. The object to be accomplished, or the thing permitted may be specified, and the rest left to the agency of others, with better opportunities of accomplishing the object, or doing the thing understandingly. In this way have the seats of justice of most of the counties in the State been located. Indeed, the old county seat of this very county was fixed by five persons named in an Act of the legislature, and under authority therein delegated to them.—Session Laws of 1826, p. 77. If the Constitution has been violated by the passage of the law now in question, then was that location by the persons named without its sanction. If, by declaring this law invalid, we restore old Galatin to her original boundaries, then by the same decision do we unsettle the old county seat, because it was located in pursuance of authority delegated by the legislature to individuals. We should say, because the legislature might have named the place, it should have done so, and in no other way could it have been constitutionally selected.

The only cases to which we have been referred, in the least countenancing the position assumed by the Relator, appear to have been decided by the Supreme Courts of Pennsylvania and Delaware, and noticed in the January and June No's (1848,) of the Western Law Journal. These we feel called upon to notice, and it is to be regretted that we have not full reports of the cases. They appear to be identical in their facts and decisions, and the same course of reasoning is pursued by both Courts. The first is *Parker v. The Commonwealth*, noticed in the January No. There it appears that the Supreme Court of Pennsylvania, by a majority of three judges to two, held that

an Act entitled "*An Act authorizing the citizens of certain counties to decide by ballot whether the sale of vinous and spirituous liquors should be continued in said counties,*" was unconstitutional. It appears that by other laws of that State, the sale of such liquors is prohibited, except by persons obtaining a license from the Court of Quarter Sessions. The legislature then passed the law complained of, authorizing the people of certain counties to determine by their vote, whether the sale of spirituous liquors should be altogether prohibited in these counties, or in other words, whether any licenses should be granted. In both cases it was admitted that the laws did not contravene any express provision of their State Constitutions, but then it was said that they were invalid because they palpably violated the principles and spirit of their constitutions and tended to subvert their republican forms of government. And how were their republican governments to be subverted? By allowing the people of the county to determine by ballot whether or not intoxicating drinks should be sold in the county? Here they perceive an attempt by the legislature to establish a pure democracy, from which, we are informed, they think greater danger is to be apprehended than from an absolute monarchy.—Such an attempt, it is supposed, is revolutionary in its tendency, and subversive of a republican government.

Besides the objection that it is inconsistent with the genius of a republican government to submit such a question to the decision of the people, the maxim before alluded to, that delegated power cannot be delegated, was invoked and relied upon by these Courts. In Delaware, the Court says: "The powers of government are trusts of the highest importance; on the faithful and proper exercise of which depend the welfare and happiness of society. These trusts must be exercised in strict conformity with the spirit and intention of the constitution

by those with whom they are deposited ; and in no case whatever can they be transferred or delegated to any other body or persons ; not even to the whole people of the State ; and still less to the people of the county. It is a plain proposition of law, that a power or authority vested in one or more persons, to act for others, involving in its exercise judgment and discretion, is a trust and confidence reposed in the party, which cannot be transferred or delegated. The making of laws is the highest act of sovereignty that can be performed in a free nation ; and therefore, the legislative power may be truly said to be the supreme power of a State. Its exercise requires superior intellectual faculties, improved by study and experience ; although it seems to be a common notion with many pretended advocates of popular rights at the present day, that every man is instinctively qualified to be a member of the legislature."

We cannot concur in the application to legislative powers, of the maxim relied upon to the extent asserted by that Court. The apprehension of disastrous consequences which might result from an unwise use of a discretion vested in the people or any portion of them, seems to have led the Court to lay down a principle, which certainly cannot, in our judgment, be maintained. No exception is made to the rule which is asserted, that legislative power is a trust which cannot be transferred or delegated. If this be true, it necessarily follows, that the legislature can authorize others, either the people, the Courts or individuals to do nothing which it might do itself. While we may concur with that Court in deprecating and condemning the fulsome effusions and unprincipled conduct of the demagogue, whose only merit consists in an artful ability to deceive the people and flatter the public vanity ; ever persuading them that they can do no wrong ; approving, defending and advocating

every popular prejudice, even at the sacrifice of his own judgment, that he may acquire an influence and use their power for selfish purposes ;—who is even willing to ride upon the whirlwind that hastens to destruction, for the giddy pleasure of guiding the storm, we ought not to allow such occasional abuse of the public confidence or credulity, to impel us to the other extreme, and conclude that the people are not safe repositories of any power—that they cannot judiciously exercise any discretion.

We have before attempted to show that the legislature may, to a certain extent, authorize others to do that which it might properly do itself ; and as its powers are all derivative, it may delegate at least some of its delegated powers, the right to do which is also denied in terms by the Court in Pennsylvania ; and yet the authority to do this, we apprehend, is clearly recognized by the latter Court in the case then before it.

In the absence of all legislation on the subject, the right of all persons to sell spirituous liquors is undoubted. A law was then passed, prohibiting the sale of such liquors by all, except such persons as should obtain a license from the Court of Quarter Sessions. Now the legislature might, had it seen fit, have exempted certain persons by name from the operation of the law by authorizing them still to sell liquor, but instead of doing so, it delegated that power to the Court of Quarter Sessions by authorizing it to grant licenses, upon terms prescribed by the law, or by its discretion, or without terms, which it is immaterial for our present purpose. This delegation of authority is not censured by the Court, nor is its propriety questioned. We do not know whether it is left to the discretion of that Court to determine whether it would grant any licenses or not. At any rate, that might have been done with equal propriety ; and if that had been done, then had the legislature delegated the very power

to one man or a few men, which it was determined could not be delegated to many men,—to the voters of the county. The same power might with equal propriety have been delegated to—or, if the expression is preferred the same jurisdiction might have been conferred upon some individual by name, which was given to the Court, and if they could confer it upon one man, why not upon more—the voters of the county? Had this authority been given to the Court instead of the voters, we are compelled to believe that no complaint of its constitutionality would have been entertained, and yet there would have been as much a delegation of powers in one case as in the others. To prove this needs no argument. If, by leaving this question to the people, the republican form of government is to be overturned, and its principles subverted by a miniature democracy, may not the same awful calamities be apprehended from a miniature monarchy? If by giving this power to the people, the one is created, then by conferring it upon one individual, we have the other. It seems to us that the latter is quite as inconsistent with the genius of a republic as the former and as subversive of its principles, although it is manifest that there is a wide difference of opinion upon the political question, as to which of these extremes we should first incline to.

It is the substance of the thing which we should look at, more than the form. It matters not whether this question is submitted to the people, the Court or individuals, by a separate Act or by the original law prohibiting the sale, and authorizing the granting of licenses; and we repeat that we apprehend the constitutionality of a clause would never have been questioned, authorizing the Court of Quarter Sessions to determine by its vote or order.

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whether any licenses should be granted in the county or not. The answer is, that in the case supposed, the Court would only have been executing a law, vesting it with a discretion, and this we conceive is the true answer to the objection which was urged against the laws in question. We are unable to appreciate the danger or impropriety, either in a political or a legal view, of allowing the legislature to vest a discretion of this kind depending upon many local circumstances for its proper exercise, either in the people or a Court, either of whom may, in truth, be much better qualified to exercise it understandingly, than the legislature itself. The application made of the maxim that delegated power cannot be delegated, would lead to most embarrassing results, and would have a much more certain tendency to despotism, than the action complained of. How those Courts reconciled their use of this maxim, with the powers universally conferred upon municipal corporations, we are not fully advised. Such corporations are always delegated with authority to pass laws, local in their character, it is true, but universal in their application within their jurisdiction;—laws precisely such as those in question. If in Pennsylvania and Delaware, there are no incorporated towns or cities, authorized to pass and enforce laws prohibiting the sale of spirituous liquors, and many other acts lawful in themselves, within their limits, we venture the assertion, that those States stand alone in this respect; and in other States, at least we imagine it has never been questioned, that such powers may well be conferred. It may be true, that this authority is usually conferred upon a board of trustees or city council, but that does not affect the question so far as a delegation of authority is concerned.—This authority might as rightfully be conferred upon the mayor alone, or upon the voters of the city, as upon a

common council. It is presumed that there is no constitutional provision, determining upon how many or upon how few, the legislature may confer this power. That must be left to legislative discretion. If the voters of a city or town may be authorized to determine, either directly by their vote, or by their local representatives, whether spirituous liquors shall be sold within their precincts, then surely the voters of a county may be allowed to do the same. Upon the question of authority it can matter little, whether the territory be greater or less, or whether it be densely or sparsely populated. Both counties and cities are municipal corporations and vested with greater or less powers, according to the discretion of the legislature. Both of these as well as other less important perhaps, but similar corporations, are usually vested with power to levy taxes, often by a direct vote of the people, and collect them, which has been well said to be one of the highest acts of sovereignty, and yet this authority is admitted to be legitimate by the Court in Delaware, in the very case, because it is said to be not the making, but merely the execution of a law. If to say that a certain tax shall or shall not be assessed and collected, is not legislation, then we are unable to see how it is the making of a law to say that spirituous liquors shall or shall not be sold. And yet how variously different men may look upon the same thing. The Supreme Court of Delaware says: "No ingenuity can discover the shadow of a similitude between the Act of the 19th of January, 1847, (the unconstitutional law,) and any part of the school law. To say that the authority given to the school voters—to members of a corporation, to determine whether a tax shall be laid or not, is a grant of legislative power, is an abuse of language." Pardon our simplicity when we inquire where they get that *authority* if it is not *granted* them by the le-

gialature? Who else gives it them? The majority may vote this tax upon the minority against their consent.— This we had supposed was not an inherent and natural right, but could only be delegated by the sovereign power of the State. This, the same Court says, is vested in the legislature, which might have imposed the tax specifically by a direct law. If all of this be true, we are unable to perceive the abuse of language anticipated; nor do we think it requires any extraordinary degree of ingenuity not only to “discover the shadow of a similitude between the” two laws, but a very striking resemblance in their principles.

Without pursuing the subject further, we think enough has already been said, to show that the legislature may delegate authority, either to individuals or to bodies of people, to do many important legislative acts, not only similar to that authorized by the law, the validity of which is here questioned, but also others of a more important, and, upon principle of a much more questionable propriety; but in doing this it does not divest itself of any of its original powers. It still possesses all the authority it ever had. It is still the repository of the legislative power of the State.

Entertaining no doubt of the constitutionality of the law authorizing the division of Gallatin county, this application for a *mandamus* will have to be denied.

However clear this may appear to us, and however novel the principle contended for may have been, still two decisions made by tribunals of as great respectability as the Supreme Courts of Pennsylvania and Delaware, and upon questions so very like this, may well have justified those whose interests and judgments inclined them to disapprove of the Act complained of, in doubting, or denying its constitutionality. The question, however, is

now settled, and we entertain no doubt that all will cheerfully submit to the provisions and operation of the law.
Application denied.

CONSTITUTIONAL LAW.

1. The Constitutional mandate requiring "an adequate compensation" to be provided for all "services" required of "the Judges of the Supreme Court and the Presidents of the Common Pleas" is as imperative as that which prohibits its diminution "during their continuance in office."

2. The comity due from one department of government to another will always induce a waiver of questions of this nature where there is nothing intolerable in the burthens imposed, or indicating danger to the independence of the judicial power, and thus threatening the subversion of the liberties of the people.

3. The Legislature have no power to abolish a court of criminal jurisdiction and another of civil jurisdiction, and to impose all the business of the said tribunals upon the Court of Common Pleas, without providing any compensation for the increased services required.

4. The Legislature cannot abolish existing tribunals for the administration of justice without making provision for the trial of the causes pending therein and for the administration of justice within the jurisdictions of the tribunals proposed to be abolished.

5. A proviso, repugnant to the enacting clause in a statute is void.

LEWIS, President of the 2d Judicial District, of Pennsylvania, delivered the following opinion and order of Court, relative to the unfinished business of the District Court and Mayor's Court of Lancaster :

The recent legislation relative to the Courts of this county, calls for some explanation of the principles upon which the new criminal jurisdiction, and the extensive increase of civil business, drawn from two other tribunals, are accepted by this Court.

On the 6th of February last, an act passed entitled "An act to abolish the District Court of the city and

county of Lancaster, and the Mayor's Court of the city of Lancaster." The Mayor's Court had been in existence from the first incorporation of the city of Lancaster, on the 27th of March, 1818, and possessed the ordinary criminal jurisdiction of a Court of Quarter Sessions. The District Court has been in existence from the 27th of March, 1820, and is a court of civil jurisdiction concurrent with the Common Pleas, with the exception of appeals from Justices of the Peace. The city of Lancaster contains a population of about twelve thousand inhabitants, and with its sixty or seventy taverns to be licensed or rejected, furnished the Mayor's Court with the amount of criminal business likely to result from such a large population. The business of the District Court, from 1840 to 1848, inclusive, amounted to *two thousand seven hundred and ten original suits for litigation*, making an average of *three hundred and thirty-eight suits per annum*. Of these, *four hundred and three suits are yet pending and undisposed of in that court*. The judgments entered in that Court, without suit, during the same period of time, amount to the number of *five thousand four hundred and eighty-three*, averaging *six hundred and eighty-five judgments per annum*. The business growing out of the measures necessary to enforce the payment of these judgments may be estimated by those who are familiar with motions to set aside executions, levies, inquisitions and sales—applications to open judgments, to bring money into court, and to determine the numerous questions of law and fact involved in the distribution of money when raised by process of law. *All the arrears of business pending in the two Courts referred to, together with all the new business hereafter to arise* and properly belonging to their respective jurisdictions, the act of the 6th February proposed to transfer to the Common Pleas. And although

the labors of those two courts have heretofore been estimated at, and paid for by the State, at the rate of two thousand six hundred dollars per annum, the act already mentioned made no provision whatever for compensating the Judges of the Common Pleas for the enormous amount of additional services required to be performed by them. Serious doubts are entertained whether any human constitution can be found of sufficient strength and endurance to perform the Hereulean labors thus required, in addition to the services already performed by the Judges of the Common Pleas, in their jurisdiction as Judges of the last mentioned Court, and as Justices of the Quarter Sessions, of the Oyer and Terminer, of the Orphan's Court, and of the Register's Court. The second section of the third article of the Constitution provides that, "the Judges of the Supreme Court and the Presidents of the Common Pleas, shall, at stated times, *receive for their services an adequate compensation*, to be fixed by law, which shall not be diminished during their continuance in office." The mandate requiring an "*adequate compensation*" to be provided for *all* "*services*" required of these Judges is as imperative as that which prohibits its *diminution* "during their continuance in office." The *first* is as obligatory as the *last*, springing equally with it from the great frame of government established by the people themselves, as the paramount law, which neither Legislators, Governors nor Judges are at liberty to disregard. But the obligation to provide an "*adequate compensation*" for *all services required* from these Judicial officers rests upon the still deeper foundations of natural justice. The principle taught by the Saviour, that the "laborer is worthy of his hire," has its home in every honest heart, and will be enforced, in a christian community, as a duty which may not be disregarded even by those who are clothed with

the high power to make laws. All acts of legislation must be in subordination to the paramount authority of the constitution, and if they are not so, it is the duty of the Courts to pronounce them null and void. The Legislature of this Commonwealth is not clothed with the dangerous omnipotence of the British Parliament. Each House of our Legislature, with the exception of its jurisdiction over its own members, is restricted by a written constitution solely to the exercise of the "powers necessary for a branch of the Legislature of a FREE State."—The government of this State, for the purpose of securing the liberty of the citizens from encroachment, has been divided into three departments, the LEGISLATIVE, the EXECUTIVE, and the JUDICIAL. Each is independent of the other, and that independence was created in order that they might respectively act as checks upon each other. It was in an especial manner provided and intended that the *Judicial power* should be preserved from encroachment, and that its independence, so long as its ministers conducted themselves with integrity, should stand beyond the reach of either of the other powers of government. If the Judge be not independent of these powers, how shall he protect the citizen from unjust and unconstitutional violation of his rights? If the liberty of speech, or of the press, should be assailed—if the habeas corpus law should be suspended in time of peace—if the trial by jury should be invaded—if the citizen should be deprived of his liberty, or property, or if his life be threatened by either of these powers, where is the remedy, and who is to stay the hand of oppression? The only remedy is in the Courts of Justice, and upon the independence and integrity of the Judges must the people rely for the maintenance of their most sacred rights. It was for the safety of the people and not for the benefit of

the Judges that the latter were protected from legislative usurpation. To insure their independence it was as necessary to provide that they "*shall receive an adequate compensation for their services*" as to declare that the compensation, when "*fixed by law,*" shall not be "*diminished during their continuance in office.*" To apply to the new services imposed a portion of the compensation allowed for services previously performed would be "*diminishing*" the salary, and is prohibited. To impose new labors without providing "compensation" is equally, in *letter* and *spirit* within the prohibition. The imposition of new services, *without compensation*, is, in every essential feature, a manifest evasion of the prohibition against diminishing the salary. If this may be done, it would be an easy matter for the Legislature, for the purpose of rewarding political favorites, to make the duties of every obnoxious Judge in the State too burthensome to bear, and thus, in effect to alter the Judicial tenure established by the constitution, and to reduce a co-ordinate branch of the government to a state of slavish dependence upon the legislative will. God forbid that such a power should be thought, for a moment, to be one of the "powers NECESSARY for the Legislature of a FREE State."

Entertaining these opinions, and being anxious, as well to be relieved from the new burthens as to prevent the embarrassments to the public *which might result from the judicial action necessary to enforce them*, it was my wish to retire from the bench, in order that some one might be found, who was willing to undertake the labors. But, upon the desire of the Bar being expressed to me, in a manner so kind as to command my acquiescence, I consented to remain at my post. In doing so, however, *it was well understood that the constitutional independence of the judicial power would be maintained.* And accordingly,

it was thought respectful to the law-making power to await its convenience, and to give time to enable it to *perfect the legislation on the subject*. The history of this legislation indicated that it was the intention of the Legislature, in some form, to make the constitutional provision for "compensation." *In the meantime, the criminal jurisdiction vested in the Mayor's Court was not accepted by the Judges of the Common Pleas; nor did they think it expedient to take any order for the trial of the causes pending in the District Court.* The comity due from one branch of the government to another always induces a waiver of questions of this nature where there is nothing intolerable in the burthens imposed, or indicating danger to the constitutional independence of the judicial power, and thus threatening, with subversion, the structure of free government and the liberties of the people. But the principle involved, on this occasion, was too important, and the amount of services required entirely too great to be evaded with propriety or disposed of with any regard to justice, under the most liberal exercise of judicial comity. *The consequence was that the Mayor's Court and the District Court remained in full existence and authority; for it will not be pretended by any one that the Legislature can abolish existing tribunals without providing others, in their place, to "give remedy by due course of law," and to "administer justice without denial or delay."* There is no power, under the constitution, to reduce any portion of the Commonwealth to a state of outlawry and anarchy, or to deprive the suitors, in causes pending, of their right of "trial by jury."

But on the 29th day of March last, another act was passed in relation to the abolition of these Courts. By that act, it is provided that "the President of the Second Judicial District shall receive, for the trial and decision of the *unfinished* business of the District Court and May-

or's Court, the compensation now allowed by law to other President Judges for holding special Courts. Provided the compensation thus allowed shall not exceed the sum of \$400 per annum. And provided further, that the said compensation shall not extend beyond the term for which the present President Judge of said District has been appointed." Thus far, the enacting clause and the two *provisos* are not inconsistent with each other, or with the Constitution, except that there is no compensation provided for the business *hereafter to arise within the limits of the Criminal Jurisdiction of the Mayor's Court*, or the accumulation of *new* civil business which will necessarily be thrown in the Common Pleas, by the abolition of the District Court. As the parties bringing suits in the Civil Courts had always their election to bring them in either Court, this is a labor unjustly imposed, for which, from the peculiar circumstances of the case, there is no remedy. But the acceptance of the jurisdiction heretofore belonging to the Mayor's Court stands at the election of the Judges of the Common Pleas, inasmuch as no compensation is provided for it. This may be waived, if thought proper. We come now to the clause appended to the second and last proviso in the section. It is in these words :

"And nothing contained in this act, or any act heretofore passed, shall be so construed as to entitle said President Judge to a compensation from the Treasury of the Commonwealth, *including his salary*, of more than two thousand dollars per annum, for all the duties he may discharge from and after the passage of this act."

As this clause restricts the whole compensation, "*including the salary*," to 'two thousand dollars per annum,' it becomes necessary, in order to understand its operation, to enquire what is the salary allowed by the existing laws.

By the report of the Judiciary Committee of the House, presented by the present Judge Knox, on the 12th of March, 1847, Journal H. R. 1847, p. 335, vol. 2, it appears that the nomination of the present incumbent was made, and the "appointment was accepted, *at a time when the salary was \$2,000 per annum, and when the intention of the Legislature to reduce it, could not have been known.*" It was also established, before that Committee, that the agreement to accept the office, the public announcement in open Court of his resignation of the Presidency of the 8th District, which he then held, and the journey from his residence as far as Harrisburg, on his way to the District where his new labors were to commence, were all entered into and performed, upon the consideration that the salary was two thousand dollars, and "without notice of any intention to reduce it."—The passage of a general law for the reduction of salaries, on the day of his confirmation and induction into office, cannot, without an express declaration of such intention, have a retrospective operation upon inchoate rights subsisting before its passage. It is upon this principle that a statute never operates, *upon causes pending*, unless such intention be *clearly expressed*. It also appears by the report of the committee, that a Judge commissioned on the 14th January, 1843, would go out of office on the 13th of January, 1853, so that the *whole* of the *first day* of the period must be counted as forming a portion of his Judicial term, and he must be deemed to have been in office *from the earliest moment of that day*. This rule of construction is required by public convenience, although it operates against him, in *actually abbreviating the duration of his official term*. It would be strange, then, if it should not operate also in his favor, when the same public convenience requires that the fraction of a day should be disregarded. And it would be remarkably singular if the law would de-

part from its established rule of convenience, and would take notice of the fractions of a day, *not for the purpose of justice, but, in order to accomplish an act of gross injustice, and to perpetrate a degrading violation of the public faith.* The Judiciary Committee UNANIMOUSLY reported that the President of this district was "LEGALLY and EQUITABLY entitled to receive \$2,000 per annum, during the continuance of his present commission." Mr. Meredith, the present distinguished head of the Treasury Department of the U. States, and one of the soundest lawyers in the country, in an able opinion on file in the Auditor General's office, concurs in the conclusions of the Judiciary Committee and enforces them by additional arguments. Other gentlemen of the highest legal talents, including almost the entire Bar of this county, have embraced the same view of the case. And the Auditor General and State Treasurer, *composing the proper accounting officers of the State*, on the 29th December, 1848, after hearing the facts of the case, and after receiving the opinion of the Hon. James Cooper, then Attorney General of the Commonwealth, that "it was a clear case that the sum to be allowed was \$2,000 per annum," solemnly adjudicated accordingly, and "settled and entered" the amount due on the books of the Auditor General. *From this decision of the proper accounting department there has been no appeal*; so that it has become *absolutely conclusive*, and *is no longer open to dispute or litigation.* The salary being thus established to be two thousand dollars already, the clause in the 2d *proviso*, which declares that the compensation awarded in the *purview* of the act, "including the salary," shall not exceed "2,000 dollars per annum," is a clause in total repugnancy to all the previous provisions for compensation. If the last clause of the second proviso is permitted to have any effect whatever, it entirely

defeats all the previous enactments in the purview of the act providing for compensation. There was a time when it was held that there was a distinction between a "*proviso*" and a "*saving clause*," and that in case of repugnancy to the purview of the statute, the *saving clause* was held to be void, but a *proviso*, under like circumstances, was thought to be valid and the whole body of the statute to be repealed. Fitzg. Rep. 195. But, in latter times, it has been remarked that there was no reason for any such distinction, that legislative bodies should not be charged with the folly of repealing a statute in the same breath that enacted it, and that a *proviso*, repugnant to the *purview* of the statute, stands in like reason with a *saving clause*, and should, in like manner, be held to be void. 1 Kent's Com. 462—3, Darris on statutes, 660. And the proper business of a *proviso* is now held to be *not to repeal the purview of the statute*, but to "*except something from it, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent.*" 15 Peter's U. S. Rep. 445. As the last clause of the second *proviso* does not perform any of the legitimate offices of a *proviso*, but *operates, if at all, to repeal entirely all the previous enactments in the section relative to the compensation, it follows that it is entirely void, and the statute must be construed as if it contained no such clause.* This construction is not only fortified, but strongly demanded by public convenience. Without adopting this construction, the whole statute would remain totally inoperative for want of the constitutional provision for compensation. Upon this construction alone, can the main object of the legislature be accomplished; and, without it, the entire purposes of that body must be defeated. The Common Pleas would not be bound to perform the services required, without some provision for compensation, and in that case the District Court and Mayor's

Court must remain in existence as before. But there is still another objection to this clause. It is not an exercise of the *legislative* function; it *enacts* nothing—it is merely an assumption of *judicial power*, and declares, not only how the present act, but how *all former acts of Assembly*, on the subject, shall be "*construed*." And it undertakes to do this, in a matter effecting the rights of a citizen under existing laws, without trial, without hearing him, and contrary to the solemn adjudication in his favor already made in the due course of law. Such a power is essentially *judicial*, and can be exercised, if at all, by the COURTS alone. The clause in question is therefore utterly void, and the act must be construed without reference to it.—The construction is that the per diem compensation allowed for disposing of the *unfinished business* of the two Courts named in the act is given, *in addition to and without diminishing the salary now allowed by law*. Upon this construction, the Court will now proceed to act, and upon this condition alone, the following orders are made for disposing of the *unfinished business* of the two Courts.

For the despatch of business required by the increased amount of civil pleas and causes in the Court of Common Pleas produced by the abolition of the District Court for the city and county of Lancaster,

It is ordered, that hereafter there be an adjourned Court for jury trials of one week immediately succeeding each regular term of the Court of Common Pleas, except April term, and that there be an adjourned Court of one week for jury trials, beginning on the first Monday of June in each year.

It is ordered that the adjourned sittings for arguments be continued two weeks, instead of one week, under the restriction specified in the existing rule.

April 9, 1849.

Supreme Court of Ohio, December 17th, 1848.

***James Galloway et al. v. Lessee of Jacob Brown.* Error. Greene. BIRCHARD, C. J. Held,**

1. That where a patent contains a call for a corner and line not established at the time of the survey, it is not a controlling call and will not govern course and distance.

2. That the call for the corner and line of A., in a patent, is to be taken as the call for a corner and line of A. as established at the time of the survey, and not as they might thereafter be established by A. in surveying his entry. Judgment reversed.

***Christopher C. Cockerell v. The Cincinnati Mutual Insurance Co.* Error. Hamilton. READ, J., Held,**

1. That a policy of insurance must be in writing.

2. That a verbal waiver of forfeiture is not valid.

3. That a verbal agreement that a policy which has been forfeited by a transfer of the interest of the assured by judicial sale, that on repurchase by the assured, the policy should re-attach and continue during the unexpired term, must, whether regarded as a waiver of a forfeiture, or a verbal policy, or an agreement to continue the old policy, to have any binding obligation, be in writing.

Judgment affirmed.

***Haywood v. Foster.* Error. Ashtabula. BIRCHARD, J. C., Held,**

1. That a witness in narrating a conversation held between himself and another cannot be permitted to testify what he meant by the questions propounded by himself, but that his meaning must be gathered from the import of the question without the aid of a subsequent explanation of his own meaning.

2. That in an action of slander, on a plea of the general issue, the defendant may give in evidence in mitigation of damages any circumstances tending to show that he spoke the words under a mistaken construction placed upon conduct which was, in fact, no justification.

Judgment reversed.

MONDAY, December 20, 1847.

Curran Milikin et al. v. Lessee of Lyne Starling, Jr.—
Error. Fayette. J. AVERY, Held,

1. That a patent for land from the United States will not be declared void, merely because the evidence to authorize its enumeration is deemed insufficient.

2. That a deed under a sale for taxes made in 1827, and before the date of the patent, cannot be given in evidence afterwards to defeat the patent.

Judgment reversed.

Henrietta Frische v. Lessee of Barnard Kramer. Error.
Hamilton. HITCHCOCK, J., Held,

1. That a purchaser at Sheriff's sale under an order for the sale of mortgaged premises is invested with all the interests of the mortgagee in the land, and so far as the lands are concerned, is subrogated to the rights of the mortgagee.

2. That as between the mortgagor and mortgagee, and those claiming under them, after condition broken, the estate becomes absolute in the mortgagee, subject, however, to be redeemed at any time before foreclosure.

3. That a purchase from the mortgagor, whose purchase was made subsequent to the date of the mortgage, cannot maintain ejectment against the purchaser at Sheriff's sale, although such subsequent purchaser was not a party to the proceedings in chancery.

4. That in such case, the purchaser may maintain a bill to redeem.

Judgment reversed.

VOL. VIII.—No. 27.

Wm. Johnson, v. Benj. Bentley et al. Assumpsit. Wayne.
READ, J., Held,

1. That the 23d section of the act of 1824, to regulate judicial proceedings where banks and bankers are parties, only suspended the rights of action upon the notes and bills of unauthorized banking associations, conferred by the act of 1816, prohibiting the issue and circulation of such paper, and that by the repeal of said 23d section, by the act of 1840, the right to sue upon such paper was restored.

2. That the question of the forfeiture of a charter will not be inquired into collaterally.

Henderson W. Horton v. James Horner. Bill of Review. Lucas. **BIRCHARD, C. J., Held,**

That a contract made in the State of New York for the payment of money there, the maker residing there at the time of its execution, is controlled by the law of that State.

Bill dismissed.

WEDNESDAY, December 22, 1847.

Portsmouth Insurance Co. v. Brazee, Kauffman & Co.—
Error. Scioto. AVERY, J., Held,

1. That abandonment is not always necessary in cases of total loss.

2. That upon such loss, the sum insured in a valued policy, is the measure of damages, and is not to be reduced on account of any expenses required in the management or sale of the damaged property.

Judgment affirmed.

Steam Boat Champion v. Frederick Jantzer. Error.—
Hamilton. HITCHCOCK, J., Held,

That under the act "providing for the collection of claims against steam boats and other water crafts, and authorizing proceedings against the same by name," an action of assault and battery cannot be maintained against

the water craft for trespass committed by one of its officers while the craft is beyond the territorial jurisdiction of this State.

Judgment reversed.

SUPERIOR COURT.—NEW YORK.

Before Oakley, Ch. J., and Sandford, J.

MAGUIRE v. GALLAGHAN.

A judgment is a contract, and therefore section 46 of the Code gives Justices Courts jurisdiction to try an action on a judgment.

Section 64 of the Code does not apply to an action on a judgment rendered by a Justice of the Peace, before the Code went into effect.

An Assistant Justices' Court is within the meaning of the term Justices' Court, as used in the Code.

By the Court, SANDFORD, J., This is an appeal from an Assistant Justice's Court of the city of N. Y., and arises under the following state of facts. The plaintiff in Nov. 1846 obtained a judgment against the defendant in an Assistant Justices' Court. In October, 1848, the plaintiff sued the defendant in an Assistant Justices' Court on said judgment. The defendant demurred, 1st. That the Court had no jurisdiction of an action on a judgment. 2nd. That no action could be maintained on a judgment of an Assistant Justice's Court. 3d. That no action could be brought on a judgment rendered in a Justice's Court within two years after the rendition of the judgment, except in the cases mentioned in sec. 64 of the Code, of which this case was not one.

The Justice overruled these grounds of demurrer, and the plaintiff had judgment.

The grounds of appeal are the same as the causes of demurrer, but we think them untenable.

Sections 46 to 57 of the Code relate to the jurisdiction of Justice's Courts, and the first sub-division of sec. 46 gives jurisdiction in "an action arising on contract for the recovery of money only." Now a judgment is a contract, and a contract too of the highest nature. It is so described by Blackstone, and his definition is acknowledged and confirmed in a series of cases; we hold, therefore, that this judgment of Nov. 1846, was a contract within the meaning of the Code, and that the Court, therefore, had jurisdiction of the subject of the action.—The judgment being a judgment of an Assistant Justice's Court, in our opinion, makes no difference, for we hold that by the terms "*Justice's Court*," used in the Code is meant and included "*Assistant Justice's Court*." This disposes of the first and second grounds of demurrer, and as to the third ground we think that sec. 64 does not apply to the case. The judgment the cause of action was rendered before the Code went into effect, and the plaintiff had an existing right of action thereon at the time the Code went into effect, and that right is not taken away by the Code, but expressly retained by sec. 388; the plaintiff, therefore, had a perfect right to bring this action without waiting until the expiration of two years, or the happening of any of the causes of exception mentioned in sec. 64. We therefore dismiss the appeal.

Judgment affirmed.—*Code Reporter*.

Supreme Court of Vermont.

MARCH TERM 1847—19 VERM. REP. 379.

ENOCH WETHERBEE v. ADOLPHUS ELLISON.

1. The manure of animals, made upon a farm, whether spread about the barn yard, or lying in piles at the stable windows, or lying in the stables, where it has been suffered to accumulate, will pass by a deed of the freehold, as appurtenant to it.

2. And the tenant will have no right to remove the manure, notwithstanding he owned the crops from which it was made, if it appear that the crops were the product of the farm; in such case the rules of good husbandry require, that the manure should be expended upon the farm.

3. And where the defendant, who was in the occupancy of the farm, as tenant, at the time of the conveyance of the farm by the owner of the fee to the plaintiff, subsequent to that conveyance removed from the farm the manure which he had before suffered to accumulate in the stable, it was held, that even upon the supposition, that, as between the defendant and the grantor of the plaintiff, the defendant had the right to remove the manure, yet, in the absence of any notice, either *actual* or *constructive*, to the plaintiff, of this right, the defendant's *intention* to remove it, at the time he piled it in the stable, could not affect the plaintiff's right to it, unless that intention was *manifested* by some act, sufficient to put the plaintiff upon inquiry at the time of his purchase.

Trespass for taking thirty loads of manure. Plea, the general issue, and trial by jury, November Term, 1844—HEBARD, J., presiding.

On trial the plaintiff gave in evidence a deed to himself of the farm from which the manure was taken, dated February 6, 1844, and also gave evidence tending to prove that, at the time the deed was executed, there was upon the farm, in a stable, which had been used for a hog pen, a quantity of manure, which the defendant subsequently took from the farm.

The defendant gave evidence tending to prove, that he had formerly owned the farm, and that he occupied it during the year 1843, and that the manure in question

was made by his cattle and hogs, from crops raised by him on the farm during that year, and that he piled up the manure in the stables where the cattle stood, and took it from the stables and carried it off the farm, without throwing or placing it, in any manner, upon the plaintiff's land.

The plaintiff requested the Court to charge the jury, that, if the defendant took the manure from the farm after the plaintiff purchased it, even if the manure had not been removed from the stables until it was loaded to be taken away, the plaintiff was entitled to recover the value of the manure so taken. But the Court instructed the jury, that, if the defendant kept the manure in the stables, intending to remove it from the farm, and did remove it without throwing it upon the plaintiff's land, the plaintiff could not recover.

Verdict for defendant. Exceptions by plaintiff.

S. Fullam, for plaintiff.

The plaintiff insists, that manure in a stable and hog pen passes by the deed with the land upon which it is situated, as well as manure made on the land, after the execution of the deed, from the crops previously raised thereon. *Stone v. Proctor*, 2 D. Ch. 108. *Ripley v. Paige*, 12 Vt. 353. The question as to the defendant's intention to remove the manure has nothing to do with the case.

O. P. Chandler, for defendant.

There is no pretence that the manure was not the property of the defendant, unless it had become part of the realty by being thrown upon the stable floor in the manner detailed. We insist, that this comes within no principle ever recognized in law ; and that manure no more becomes a part of the realty, in such case, than would grain, or potatoes, if thrown into a corner of the stable, for the purpose of being afterwards removed. *Stone v. Proctor*, 2 D. Ch. 108.

The opinion of the Court was delivered by

KELLOGG, J. The principle may be regarded as well settled in this State, that the manure of animals, spread about the barn yard, or laying in piles at the stable windows, is so attached to the land, that it passes, by a deed of the real estate, to the grantee. It was so held by this Court in the case of *Stone v. Proctor*, 2 D. Ch. 108; and this would seem to be decisive of the present case, unless the situation of the manure, at the time of the conveyance of the freehold to the plaintiff, was such as to materially vary it from the case of *Stone v. Proctor*. Now we cannot perceive any substantial difference, as it respects the rights of the owner of the freehold to the manure, whether the same is in the yard, or at the stable windows, or in the stable, where the same has been suffered to accumulate. The same would, in either case, pass by a deed of the freehold, as appurtenant to it.

But it is urged, that the manure in question was made from hay which belonged to the defendant, and that therefore he had the right to remove it. This, we apprehend does not, under the circumstances of the case, give the defendant the right he claims of removing the manure.— It appears, that the defendant occupied the farm the year preceding the removal of the manure, as a tenant; and, as we understand from the bill of exceptions, the manure was made from the crops raised upon the farm; which the rules of good husbandry required should be used and expended upon and about the farm. Under such circumstances, in the absence of any agreement authorizing it, he would not have a right to remove the manure from the farm.

The Court below seem to have attached importance to the fact of the defendant's *intention*, by keeping the manure in the stables, to remove it, and to have so instructed the jury. This, we think, unqualified and unexplained,

was clearly erroneous. Even upon the supposition, that, as between the defendant and the grantor of the plaintiff, the defendant had the right to remove the manure, yet in the absence of any notice, either *actual* or *constructive*, to the plaintiff, of this right, the defendant's *intention* to remove it could not affect the plaintiff's right to the manure unless that intention was *manifested* by some *act*, sufficient to put the plaintiff upon inquiry, at the time of his purchase.

Upon the whole, we are of opinion that the instructions to the jury were wrong ; and consequently the judgment of the County Court must be reversed.

Supreme Court of Penn'a.--Eastern District--Phil'a.

Reported for the American Law Journal by R. C. M'Murtrie, Esq.

ABSTRACTS OF DECISIONS.

MARCH 12, 1849.

A statement of a debt in the schedule of an insolvent, is not such an acknowledgment as will take the case out of the statute of limitations. *Christy v. Flemington.*

MARCH 14.

The Orphans' Court in settling a distribution account, have no jurisdiction over a claim by the administrator in his own right on the distributees. *Carter's Appeal.*

MARCH 17.

A consignment coupled with an order to transmit the nett proceeds of a shipment to A., a creditor of the consignor, is an appropriation of the proceeds. And when the consignee deducted his general balance, and invested the balances arising from the shipment due on former account in a return cargo, A. is entitled to the whole of the proceeds of such cargo, not exceeding the amount which had been appropriated to him. *Ashmead v. Borie.*

MARCH 19.

Where a partnership received goods on consignment, and one of the firm, alleging that he had instructions to retain the proceeds to secure the claim of a third person, and without the knowledge of his partner, paid over the proceeds in satisfaction of that claim under a promise of indemnity to himself, after which he was compelled to pay the value of the goods to the rightful owner, the other partner not being liable to contribute to the loss is a competent witness for his co-partner in an action on the indemnity. *Thomas v. Brady*.

Proceeds of goods applied in payment of a debt under a mistaken belief that they had been assigned to secure that debt, or that the party paying was indemnified, may be recovered back.

A letter offering a compromise and stating that the party was willing to loose a certain sum to settle the case, but omitting to state that the writer was indemnified against that loss is not evidence against him in an action brought by him on the promise of indemnity, the existence of which had been denied by defendant before the letter was written. *Ib*.

A. having received goods from B. for the purpose of protecting them from the creditors of B., was about paying over the proceeds to the rightful owner, but on receiving a promise of indemnity from C. applied them to a debt due by B. to C. In an action on the contract of indemnity, C. cannot avoid his promise on account of the fraud in the original transaction. *Ib*.

MARCH 26.

Where one of two assignees filed a separate account charging himself with the proceeds of the whole estate, resulting in a balance due himself, which was confirmed, the surviving assignee cannot be compelled to account for any matters included in such statement, though it appears he joined in a conveyance, the proceeds of which entered into such account. For trustees are not liable for the acts and omissions of their co-trustees unless there be fraud or negligence, and then only where the estate of the defaulting trustee is insolvent, and the account filed and confirmed is conclusive in favor of the assignee filing it. *Stell's Appeal—In re Gray's Estate*.

A judgment before a Justice of the Peace in another State is not within the act of Congress directing the mode of authentication of the records and judicial proceedings of the Courts of the several States, and if it were a copy of the proceedings, not certified to be attested according to the form used in such State, is not evidence. *Snyder v. Wise*.

To effect a conversion by a conveyance with power to sell, the exercise of the power must be directed and not discretionary. Hence, where a conveyance was made to trustees to pay an annuity out of the rents and

profits, or to sell, and if sold in the life time of the annuitant to place the proceeds at interest and out of that to pay the annuity, and at decease of the annuitant the principal and any surplus interest arising from the sale of the premises if not sold before, to be divided among the grantees—does not work a conversion of the estate of the grantees into personality *Bleight v. The Manufacturers' & Mechanics' Bank.*

MARCH 28.

A bill for the discovery of assets, &c., lies against a corporation under the act of 1836. But such a bill can only be filed by a sequestrator appointed under the provisions of that act. *Bevens v. The Dingman's Choice Turnpike.*

APRIL 2.

The Legislature is not bound to require a turnpike co. to make compensation for lands taken for the use of the road. *Hallowell v. Doylestown Road.*

In partition under the act of 1832, the inquest may divide the land into more purparts than there are heirs, and such of the purparts as are not accepted may be sold. *Derragh's Appeal*

The husband cannot recover the wife's lands against her consent where they are living separate by reason of his ill treatment, for which proceedings for divorce are pending. *Rorer v. D. Brien.*

The existence of a delusion in the testator's mind is merely evidence of insanity—but not conclusive that the testator was not competent to make a will. *O'Neil v. Evans.*

Bequest to the children or legal heirs of my brother D. A grand child of D. whose parent died before testator is entitled to a share. *Sorver v. Berndt.*

APRIL 2.

Plaintiff in an execution having refused to comply with his purchase of real estate, is liable for a loss on a resale and cannot set up the defective description in the levy. *Spang v. Schneider.*

Defendant appealed from an award and the plaintiff obtained a verdict for a less sum than the award; he is entitled to full costs. *Remely v. Kuntz.*

Where a report of viewers is set aside for informality the case is not within a rule of Court which provides that when proceedings for a road have failed, another application for such road shall not be acted on for one year from the sessions at which such road was finally rejected. *Towarrencin Road.*

APRIL 3.

A voluntary judgment confessed by one not indebted, but with a design to defeat a supposed liability which did not exist, is rendered fraudulent

as to subsequent creditors by reviving it by sci : fa : and issuing an execution thereon. *Serfoss v. Fisher.*

An assignment of a wife's chose (pending proceedings for divorce) being voluntary, and for the mere purpose of barring her survivorship, made by a husband who has deserted his wife, does not divest her title—and payment to the assignee under an indemnity does not discharge the obligation. *Krupp v. Scholl.*

An accepted order for the delivery of goods requires a consideration to make it binding on the drawee before a delivery pursuant to the order without notice.

And in all actions for goods sold such an order having been pleaded as a set off by the payee, the drawer is a competent witness to prove it was given without consideration. *Davis v. McGrath.*

The delivery of rags to a manufacturer to be made into paper to be returned—does not vest a title to the paper in him—although the rags were charged at a certain price, and the paper was to be paid for at another price, it being found this was not an exchange of rags for paper. *King v. Humphreys.*

APRIL 7.

Where there is a special contract by the plaintiff to do certain work for which defendant is to furnish the materials and pay the agreed price, it is not necessary in an action to recover the value of a partial performance to prove that defendant had notice that materials were not furnished to complete the work.

A withdrawn declaration and a bill of particulars delivered under it ought not to be taken out by the jury, but the judgment will not be reversed if the declaration is in substance the same as the one on which the cause is tried, and the bill is but a statement of the claim of which evidence was given on the trial. *Hall v. Rupley.*

An act of Assembly directing the County Com'rs. to determine the exact site of a new county town, and to erect the public buildings there if a majority of the voters of the county shall vote in favor of the change, is constitutional. *Comth. ex. rel. Lyons v. Painter.*

APRIL 9.

The omission from the body of a mechanic's claim of the initial letter of the middle name of the owner is immaterial. *Knabb's Appeal.*

In a joint claim it is unnecessary to set out whether the parties filing it claim as partners. *Ib.*

If it does not appear that there was a contractor other than the owner the name of the contractor need not be set out in the claim. *Ib.*

A claim against a house and lot in the A township B county, belonging to J. M. H., adjoining lands of B., is sufficiently descriptive of the locali-

ty—it not appearing that J. M. H. had other lands in the same township. *Ib.*

A bill of particulars annexed to the claim and referred to therein is a part of it—and if the dates and items are there specified it is sufficient. *Ib.*

If there is but one date in the bill the materials are presumed to have been furnished on that day unless the contrary appears. *Ib.*

A claim setting forth in one bill the items of materials furnished and work done under their respective dates is sufficient. *Ib.*

A lien creditor may object to the form of a mechanic's claim filed against the estate of his debtor. *Ib.*

The sale and conveyance of a house and lot by the first builder does not pass the right of reimbursement for so much of the party wall erected by him as is used by the second builder, and a payment to the grantee is no payment. *Gilbert v. Drew.*

In assumpsit by a justice for fees, the statute of limitations is a good plea. *Harris v. Christian.*

APRIL 13.

The cancellation of a second will which had revoked a former will by implication leaves the former will in full force—if it be retained by the testator until his death uncanceled—and this effect of such cancellation cannot be rebutted by evidence of conveyances of part of the property mentioned in the former will, nor by evidence of a reconciliation having been effected between testator and certain members of his family disinherited by the former will—nor by evidence that one of the trustees there named had died before the cancellation—nor by proof of testator's subsequent declarations inconsistent with an intent to revive the former will. *Floritram v. Bradford.*

Nor is it material that testator made a third will inconsistent with the former wills, but which did not contain apt words to pass real estate—nor are declarations by a devisee under both wills that testator intended to pass real estate evidence to rebut the presumption of an intent to revive the former will. *Ib.*

Testator died in 1838, leaving a will dated in 1821, with an unsigned addition: a will dated in 1824, which had been cancelled at an uncertain time, and which was inconsistent with the will of 1821: a will dated in 1835, which did not purport to pass real estate. Held, that the will of 1821, so far as it passed real estate then held by testator, was revived by the cancellation of the will of 1824. *Ib.*

APRIL 14.

Where the Sheriff sold fixtures under a fi: fa: with the verbal consent of the owner of the land, and the purchaser paid the price and took possession, his title is good against a subsequent vendee of the land before actual severance. *Mitchell v. Freedley.*

Where it appeared that the consent was given under an agreement that the execution creditor would buy in the property and permit the defendant to redeem, and the fact that the creditor had limited his agent as to the price was not communicated until the sale—when the agent bought for himself—the defendants, not objecting to the sale at the time, and not applying to the Court, but treating with the purchaser as to the terms of redemption—cannot subsequently object, nor can their vendee, having notice, set up that the consent was avoided. *Ib.*

Defendant quitting possession pending an ejectment is not liable for profits after that time. *Ib.*

APRIL 16.

Guardian held liable for an investment in stock of a Navigation Co. when in good credit and paying large dividends for a long time subsequent; where it was common for other trustees to invest in such stock and for others to use it as a permanent and safe investment, and where the guardian had invested his own funds in the same manner, and though the stock continued to pay large dividends, and be in good credit for some years after the investment, an elder of the wards who received the stock on attaining their majority had realised a large profit on the investment of their share of the fund. *Worrall's Appeal.*

APRIL 17.

The patentee of a lock assigned his right and received as a consideration certain bonds of his assignee. At the same time he gave them a covenant that he had a right to the letters patent, and that if any person should establish a right to the invention the bonds should be void and that no recovery should be had on the bonds until the suit that might be then depending should be determined in his favor by the decree of a lawful court. In a suit on the bonds the obligors cannot set up the invalidity of the patent as a defence. *Ball v. Murry.*

New Publications.

PUBLIC LAWS OF THE UNITED STATES OF AMERICA. Passed at the first Session of the Thirtieth Congress, 1847-1848. Carefully collated with the Originals at Washington. Edited by George Minot, Counsellor at Law. To be continued annually. Boston: Charles C. Little & James Brown. 1848.

We have received and looked through this pamphlet with much satisfaction. Whatever encomiums have been bestowed upon the former

volumes may be fully given to this. The order of arrangement is the same; the size of the page and the type is the same, and the whole execution of the work, typographical and editorial, is similar. There are several reasons why the edition to which this is the third Annual Supplement, is superior to all other editions of the United States Statutes.

It has the sanction of Congress, and is issued under their auspices. It is to be the edition supplied to the officers of the government.

It contains *all* the laws and yet is put at a less price than those editions which contain only a portion of them.

The purchaser will be sure that he can find every law which he may have occasion to refer to.

It is enriched with copious notes of the decisions of the Courts of the United States on the several statutes, and with references to other statutes.

It is the only edition in which the laws are chaptered as is directed by the joint resolution of Congress of March 3, 1845, except the Session Acts, which are too expensive to be within the reach of but very few persons.

It can be relied upon for accuracy. It is printed with great care, from authorized editions of the laws, and then is subjected to a careful revision by the records at the seat of government.

The superiority of the paper on which it is printed, and of its typographical execution, over all other editions.

It contains the entire series of General and Private Laws and Resolves, obsolete or in force, chronologically arranged; all Treaties with foreign nations or Indian tribes, in the same arrangement; the Articles of Confederation and the Constitution; references, in proper places, to the decisions of all the Federal Courts applicable to any law, resolve, or treaty; and references, also, in proper places, to other laws, resolves, or treaties, upon the same subjects with those in the text. The whole succession of laws is most conveniently distributed into statutes and chapters, with a running title at the head of each page, expressing the session of Congress and the date and chapter of each law or resolve which is contained on the page, with a full alphabetical verbal general Index of matters, and a separate Index to each volume. Any of our brethren who will take the pains to compare the bad paper, the bad type, the shorn margin and the general bad execution of the annual Pamphlets, (see acts of session of 1847-8 as an example,) put forth by the Government printers, will not fail to thank heartily our friends, Messrs. Little & Brown, for their readable and useful substitute for the dingy "official."

A TREATISE ON THE LAW OF EXECUTORS AND ADMINISTRATORS. By Edward Vaughan Williams, (now one of the Judges of Her Majesty's Common Pleas. 3d American, from the 4th London edition. With notes and references to American authorities. 2 volumes. Philadelphia: R. H. Small, Law Bookseller. 1849.

This edition was published in Philadelphia during the month of March, of the present year, from the last English edition, received in sheets by the American publisher *before it appeared to the English profession*. It contains nearly 300 more pages of original matter than the 2d American edition, together with an extensive reference to, and commentary on the latest English cases.

In this edition the former notes of Mr. Troubat appear to be preserved unaltered, to which have been added the latest American cases that illustrate the doctrine of the text, prepared with care by a gentleman of the Philadelphia Bar. The two volumes contain nearly two thousand pages.

We have not had leisure to examine all the new matter contained in this edition. But, from what has been said, it will be perceived that the Philadelphia publisher deserves the encouragement of the profession for his enterprize and attention to their wants, in furnishing so promptly, and with valuable additions, a re-print of the latest English edition of a work of acknowledged value.

Morris on Replevin.—P. Pemberton Morris, a gentleman of the Philadelphia Bar, has furnished the profession with "A practical treatise on the law of Replevin in the United States, with an appendix of forms and a digest of statutes." The law of Replevin has been so greatly improved in the United States, and rests so extensively upon usage and decisions, scattered through the Reports, that this treatise will, without doubt, be well received. It places within reach of the student and the practitioner "information which cannot elsewhere be obtained, but at the expense of much time and labor." The work appears to be executed with care and ability by the editor, and the publishers, James Kay jr. & Brother, have done all that was necessary to present it to the public in an acceptable style.

JUDICIAL DISTRICTS IN PENNSYLVANIA.

The following changes have been made in the Judicial Districts of Pennsylvania at the last session of the Legislature.

The Second District, composed of Lancaster county. The District Court and the Mayor's Court of Lancaster have been abolished, and the whole duties and jurisdictions of these Courts transferred to the Common Pleas.

The Eighteenth District, now comprises Venango, Clarion, Jefferson, Elk and Forest counties.

Thirteenth—Bradford, Tioga, Potter and M'Kean.

Eleventh—Luzerne, Susquehanna and Wyoming.

Sixth—Erie, Crawford and Warren.

Twenty-first—Schuylkill.

Twenty-second—Wayne, Pike, Monroe and Carbon.

Third—Northampton and Lehigh.

Twenty-Third—Berks.

Twenty-fourth—Huntingdon, Blair and Cambria.

The following appointments of President Judges have been made by the Governor and confirmed by the Senate :

FREDERICK WATTS, of Carlisle, President of the 9th District, composed of the counties of Cumberland, Perry and Juniata.

WM. JESSUP—11th District,—composed of the counties of Luzerne, Susquehanna and Wyoming.

HORACE WILLISTON—13th District—Bradford, Tioga, Potter and M'Kean.

DANIEL DURKEE—19th District—York and Adams.

NATHANIEL B. ELDRED—22nd District—Monroe, Pike, Wayne and Carbon.

DAVID F. GORDON—23rd District—Berks.

GEORGE TAYLOR—24th District—Huntingdon, Blair and Cambria.

JOHN J. PEARSON, of Mercer county, President of the 12th District composed of the counties of Dauphin and Lebanon. In selecting a President for the District in which the seat of Government is located, the Governor has been peculiarly fortunate. As a gentleman and a jurist, Mr. Pearson is not surpassed by any man on the Bench. We make this remark without intending to detract from any of the gentlemen named in the foregoing list, most of whom are known to be able and eminent.

THE HISTORY AND LAW of the writ of Habeas Corpus, with an essay on the Law of Grand Juries. By E. Ingersoll, of the Philadelphia Bar. Philadelphia. 1849.

This is a valuable work of 67 large octavo pages. It is neatly printed on paper of an excellent quality, and, from the examination made of its contents, we presume will be useful to all intelligent citizens in and out of the legal profession.

THE
AMERICAN LAW JOURNAL.

JUNE, 1849.

District Court of the United States,
FOR THE NORTHERN DISTRICT OF N. Y., JAN'Y 1849.

CHARLES L. GAGER vs. THE STEAM-BOAT A. D. PATCHIN:
HARRY WHITTAKER, Claimant and Respondent.

A suit for salvage *in rem* as well as *in personam* may be maintained in the Admiralty for services, which, if rendered voluntarily would be salvage services, notwithstanding they were rendered in pursuance of a previous agreement specifying the amount of the remuneration therefor, and although the contract was made with the owner of the vessel saved, especially if the owner was also the master, and the fact of his proprietary interest was unknown to the other party.

Although all the suitors for salvage ought to join in the suit against the property saved, the non-joinder of the crew of the salvor vessel in a suit by the master and owner, is no impediment to the maintenance of such suit, especially if the services of the crew required no extraordinary exertions and were attended with no extraordinary personal danger.

Although the amount agreed to be paid for salvage services is not binding in a Court of Admiralty upon the party at whose instance, or for whose benefit the service was performed, and will be reduced by the Court if exorbitant, and especially when assented to by such party under the pressure of alarm or distress, yet where the agreement has been deliberately entered into and does not appear to be oppressive, it will be enforced according to its terms.

[This was a suit for salvage on account of services ren-
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dered by the steamer Albany, of which the libellant was owner and master, to the steamer A. D. Patchin, while hard aground on a ledge of rocks, upon which she had been carelessly run at Racine Point, in the State of Wisconsin. The facts and circumstances of the case will be sufficiently manifest from the judgment of the Court.

Eli Cook, for the Libellant. George Underwood, for the Claimant.]

CONKLING, J. One of the objections urged against the libellant's right to maintain this action is, that the services for which he claims compensation, having been performed in pursuance of an express agreement between the parties, and for a stipulated compensation, this is not a case of salvage but a case of contract of which the Court has no jurisdiction. In support of this objection, the counsel for the claimant relies upon the similar case of the *Mulgrave*, (2 Haggard's R. 77,) in which Lord Stowell pronounced against the action on this ground, observing that it was not a case of salvage, but one of contract, and that he could not entertain the question. Lord Stowell did not, of course, intend to say that he could entertain no action arising *ex contractu*, but only that the case before him not being a case of salvage, he could not entertain it as a case of that character; and not being a case falling within either of the descriptions of contract embraced within the jurisdiction of the Court, he could not entertain it as such. It is well known that the only contracts upon which, at the date of this decision, original suits were in fact entertained in the English High Court of Admiralty were those for seaman's wages and bottomry bonds, although it has always been conceded that the jurisdiction of the Court extended to all such contracts as were made on the high seas and were to be there executed. But by a long series of American decisions, terminating with that of the *New Jersey Steam Navigation Com.*

vs. *The Merchant's Bank*, (6 Howard's R. 344,) the principle is now firmly established that the jurisdiction of the American Courts of Admiralty does not depend on the decisions of the English common law courts, relative to the jurisdiction of the High Court of Admiralty of England, but that all contracts in their nature strictly maritime are cognizable in the Admiralty. Such, certainly, is the character of this contract; and if the suit had been *in personam*, the jurisdiction of the court would have been unquestionable. But whether the contract created a lien on the *Patchin*, and may therefore also be enforced in a suit *in rem*, is another question not devoid of difficulty.—That a suit in the Admiralty for salvage may be maintained in either form, has never been doubted, and this right is moreover expressly recognized and declared by one of the late Rules prescribed by the Supreme Court. If, therefore, the salvor's title to remuneration in ordinary cases may be considered as founded in implied contract, it might, with great apparent force and propriety, be insisted that the remedial right of the salvor could not, in any degree, be impaired by an express contract, entered into before hand, for the mere purpose of fixing the amount of compensation, without any express or clearly implied intention of waiving the right to prosecute in either of the accustomed forms. But suits for salvage have generally been considered—though I confess it has always appeared to me with somewhat questionable propriety—as cases rather of tort than of contract. It would not necessarily follow, therefore, because the maritime law gives a lien in favor of the salvor in a case strictly of salvage, that it also confers one for services of the like nature rendered in pursuance of a contract. But it is a general principle of the maritime law, that from contracts made by the master which bind the owner, as all authorized contracts entered into by him on account of his ship

do, unless otherwise expressly provided, there results an implied hypothecation of the ship. The master, undoubtedly, has authority to hire the services of others, when necessary, for the preservation of his vessel, and I imagine that such a contract, subject to the revisory power of the court, would constitute a lien on the vessel. It happens, however, in the present instance that the master was also the sole owner of the vessel to which assistance was rendered; and it is insisted that on this account, he incurred no other than a personal responsibility. Admitting the general principle thus asserted, it becomes necessary, nevertheless, to enquire whether the present is a case to which it is properly applicable.

The contract was originally entered into between the libellant in person and Lewis J. Higby, professing to act as agent for the claimant. It was in writing and is in the following words:

“ This article of agreement made this 13th day of June, 1848, between the steamer *Albany* and the steamer *Patchin*, Capt. H. Whittaker, in which Capt. Gager of the steamer *Albany*, agrees to do all he can do, to assist said *Patchin*, now on the rocks at Racine Point, Wisconsin, and to stay with her until discharged by said Capt. Whittaker, and said *Albany* is to be paid four hundred and fifty dollars per day, and the time to commence four o'clock to-day, said *Albany* to have the privilege to make harbor in case of storm.

H. WHITTAKER,

PER L. J. HIGBY, Agent.

Milwaukie, June 13, 1848.

The agreement was made at the place where it bears date, a few miles from the place where the *Patchin* lay, and on being soon afterwards made known to the claimant, was by him assented to. His residence was in Buffalo, in the State of New York. The claimant, it will be observed, is described simply as captain of the *Patchin*,

and there is no allegation in the pleadings, nor any evidence that the libellant had any knowledge of his proprietary interest in the vessel. In the case of the *St. Jago de Cuba*, (9 Wheat. R. 490, 5 Cond. R. 631,) it was held that although for materials or supplies furnished in a home port, no implied lien in general attaches to the ship, the reasonable presumption being that they were furnished on the credit of the owner, yet that if a vessel comes into her home port, in a foreign guise, and obtains supplies, this principle is applicable to the case, and a lien in favor of the material men arises. "The questions," say the Court, "then arise, on what does the privilege of the material men depend? on the state of facts, or on their belief of facts?" The answer given by the Court is that it depends on the latter. *De non apparentibus et not existentibus, cadem est ratio*; and applying the principle decided in *The St. Jago de Cuba* to the present case, it would follow that the contract ought to be treated as having been made with the master as such, unless the libellant was bound to show affirmatively his ignorance of the fact, that the claimant was also the owner of the *Patchin*. But considering that the contract was made at a place remote from the owner's residence, and that the claimant is described in it only as master; and considering also that his ownership is now set up by him for the purpose of exempting his vessel by way of exception from the general rule, I am of opinion that the *onus probandi* lies upon him to show the libellant's knowledge of such ownership.

In discussing this point, I have thus far conceded that if the libellant had known that the claimant was the owner and had contracted with him as such, no lien would have resulted from the contract. But I infer that the late Mr. Justice Story entertained a different view of the law, and that he supposed it to be in this respect immaterial whether the contract was made with the master or owner.

In the schooner *Emulous* (1 Sumner's R. 207,) which was a suit *in rem*, the vessel was owned in Boston, and having struck on a rock within the waters of that State, one of the sets of salvors contracted to tow her into port for a specific sum agreed upon. The contract, it is true, was made with the master of the schooner, though, as already observed, in the State to which she belonged. But the learned Judge in a formal exposition of what he understood to be the law applicable to cases of that nature, seems not to have recognized any distinction between contracts of this description entered into by the master and those made by the owner in person. His language is as follows :

“ The Court has been asked upon this occasion to lay down some clear and definite rule as to what shall be deemed salvage service, and what shall be deemed a mere common contract for labor and services. I take it to be very clear, that whenever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily and without any controlling circumstances on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation, for labor and services *quantum meruerunt* ; in either case it does not alter the nature of the service, as a salvage service, but only fixes the rule by which the Court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. It is true, that contracts made for salvage services are not ordinarily held obligatory by the Court of Admiralty upon the persons whose property is saved, unless the Court can clearly see that no advantage is taken of the parties' situation, and that

the rate of compensation is just and reasonable. The doctrine is founded upon principles of public policy as well as upon just views of moral obligation. No system of jurisprudence purporting to be founded upon moral or religious or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract, unjust, oppressive or exorbitant, that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty, into a traffic of profit which would outrage human feelings and disgrace human justice."

In *The Centurion* (Ware's R. 477, 482,) the learned Judge of the District of Maine cites the case of *The Emulous*, as in his judgment containing a just exposition of the law of salvage. It is quite "immaterial" he observes "whether the salvors accidentally fell in with the wreck and volunteer their services, or are called upon by the owners or persons interested in the wreck to aid in saving it. It is the place where the property is situated, and the circumstances of exposure and peril in which it is found, that determine the question whether it is a case of salvage or not."

But in a later case (that of *Bearse, et al. v. 340 Pigs of Copper*, 1 Story 314) which arose in the District of Massachusetts, and was finally decided on appeal at the Circuit Court, the objection was distinctly taken, that the services having been performed in pursuance of an express contract, no action *in rem* could be maintained therefor. The contract was made in that case not by the master, but by the proprietors in person, of the property saved; but this circumstance does not seem to have been considered of any importance even by the counsel for the claimants. The objection was that the service, though of a nature which would otherwise have been a salvage ser-

vice, having been performed by contract, no right accrued from it to the libellants to proceed against the property. The District Judge "held that as the respondents had denied in their answer that any contract subsisted between them and the libellants, at the time the property was recovered, which also appeared upon the evidence, the libel was rightly brought against the property, whether the principle contended for by the libellants was correct or not." The conclusion of Mr. Justice Story on the appeal also was, that the particular services in question were not embraced within the contract set up by the claimants, under which other salvage services had been previously performed by the libellants. But he adverts to the question only as one bearing upon the amount of remuneration to be awarded, and seems not to have considered it at all affecting the right of the libellant to maintain his action *in rem*. He refers also with apparent approbation, to his observations above cited in the case of *The Emulous*. The just inference, therefore, appears to be, that he considered all services, which if rendered voluntarily would be salvage services, as not the less so because rendered in pursuance of an agreement for that purpose; and as entitling the salvor to the like remedies, whether rendered in the one form or the other. If the salvor, especially after the performance of the service, should take a bond or receive a bill of exchange or a negotiable promissory note in payment, it may be conceded that his remedy would be limited to a personal action on the security so taken. But there does not appear to be solid reason for denying to the salvor, a lien on the property saved, merely because the salvage service was performed at the request whether of the master or the owner, and under a promise of remuneration, especially as a Court of Admiralty possesses an unquestionable power to shield the owners of property saved, against extor-

tionate exactions, by reducing an exorbitant reward, promised under the pressure of alarm or distress. My opinion therefore is that this objection is invalid.

It is farther insisted by the counsel for the claimant, that the stipulated services were not faithfully performed, and that they were in fact worthless. I think this objection has not been substantiated. The witnesses for the libellant give a very exact and intelligible account of the services rendered and the means used by the libellant to relieve the *Patchin* from her highly perilous situation.— This evidence in itself considered is entirely satisfactory, and leaves no room for doubt that the libellant did all that he could reasonably be expected to do, for the relief of the *Patchin*; that he contributed essentially to her rescue. The witnesses on the other side deal in general censures of the libellant's management; but when pressed to specify the particulars in which his misconduct consisted, they are unable to do so. Indeed, all the more important measures resorted to, were dictated by the claimant himself, and his directions appear to have been readily acquiesced in by the libellant.

It was insisted also by the counsel for the claimant, that the persons composing the crew of the *Albany* ought to have been parties to the suit. When, as is commonly the case, salvage is claimed by the crew, as well as by the master and owners of the salvor vessel, and a suit is to be instituted in the Admiralty therefor, it is certainly proper that all should join in such suit; and in case where the salvage service was highly meritorious, as, where it required exhausting labor, or was attended by great danger, if the master should designedly institute a suit in behalf of himself or of himself and his owner, alone, in the hope that through the ignorance of the crew, he might secure a large reward to himself at their expense, he would expose himself to just censure; and there may be cases in

which it would be the duty of the Court to enquire into the reason of the non-joinder of the seamen, and to see that their rights are maintained, unless they choose voluntarily to relinquish them. But in the present case the crew of the salvor vessel were exposed to no extraordinary hardships or personal danger. Their services were rendered chiefly on board their own steamer, and were substantially such as they had contracted to perform ; and they probably and perhaps very properly deemed their stipulated wages a sufficient compensation therefor. If they had thought otherwise, it may be supposed that they would have applied to the Court for redress, and it is a mistake to suppose that the right of the libellant as owner and master of the *Albany*, to prosecute his suit, is prejudiced by their non-joinder in the action.

With respect to the amount of remuneration to be awarded, there are no circumstances attending the case, which demand the jealous scrutiny of the Court, into the reasonableness of the stipulated reward. At the time the contract was entered into, the *Patchin* was in no danger of immediate destruction. The weather was fair and calm ; a large number of persons were already engaged in endeavoring to get her off the rocks ; steamers were frequently passing very near to the spot where she lay ; the terms of the agreement seem to have been deliberately settled, and in order to determine the just measure of compensation, the books of the *Albany* were resorted to, for the purpose of ascertaining her ordinary earnings, and the amount to be paid was fixed accordingly. The circumstances of the case scarcely admitted of the indulgence of a spirit of rapacity by the libellant, and there is no evidence tending to show that he was actuated by any such spirit. To say nothing of the great value of the *Patchin*, the *Albany* herself was a large and valuable steamer. After transferring her numerous passengers to

another steamer and refunding their passage money, she was constantly employed not altogether without danger to herself from hidden rocks, in rendering assistance to the *Patchin*, during four successive days and nights, and during a portion of the time in strenuous efforts, subjecting her to heavy strains to jerk or drag the *Patchin* from the rocks. For these sacrifices and services, I cannot say that the stipulated sum of \$450 a day is an exorbitant or even an unreasonable compensation; and I am satisfied that the duty of the Court will be best performed, by simply enforcing the voluntary agreement of the parties. I accordingly award to the libellant the sum of \$1800, deducting the sum of \$300 already paid, with interest from the 17th day of June last, when the service was consummated.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

CHESTER GORHAM vs. WILLIAM MIXTER, et. al.

This was an action on the case for an alleged infringement of a patent, for "an improvement in the machine for pressing palm-leaf hats."

The defence set up was—1st. That defendants had not infringed; or, in other words, that the machine used by them was substantially different in its construction and mode of operation, from the machine described in plaintiff's specification of claim in his letters patent. 2d. That plaintiff was not the original and first inventor of the machine patented, but that the same was known and used prior to his supposed invention thereof.

The plaintiff made application in the autumn of 1839, and obtained his letters in March, 1840.

The history of the art of pressing in this Commonwealth, so far as it was known to witnesses, was traced from 1830 to the trial.

In 1830, the machine in general use had three blocks for the hat, with a lever and flat to each, and the pressing of the rim, crown and top of the hat was performed separately, at three successive operations on the respective blocks, by removing the hat from block to block.

These blocks were attached to revolving shafts, which were moved by hand or other power, as circumstances dictated ; and the levers to which the pressing flats were attached were arranged, and the pressing done by hand.

In 1832, the plaintiff made an attempt to improve upon the old machine. He constructed a machine in which but one block was used, and made an angular flat to fit the side and top of the hat at the same time, thereby pressing the whole hat without removing it from the block. It did not appear in evidence, however, that by this arrangement the whole hat was pressed at one operation, without a change of flats.

A similar machine to the last, though somewhat improved in its structure, was shown to have been put in operation in 1834, by one Brown, of Dana, Massachusetts, used for a time, and abandoned.

Also, one Charles Rice, of Boston, testified for the defence, that in 1835 he constructed a machine of the same general character, using one lever and one flat,—that in 1836 he added the second lever and flat, making the two answer the purpose of three flats ; and in 1838 he added the third lever and fourth flat.

In this machine, the block shaft was turned, and the levers operated by hand, but the whole hat was pressed without changing flats.

In 1837, the plaintiff invented and put in operation a machine with one block, three levers and the same number of flats, by which the hat in all its parts was pressed by one operation. The shaft was moved by water power and the levers to which the flats were appended, were fastened by a catch, so as to press upon the hat, while it revolved in connection with the shaft, thus dispensing with the power of the operator, and in a measure acting automatically.

In the machine patented by the plaintiff, four flats, two for the rim on opposites sides, one for the side of the crown, and one for the top, are attached to a sliding frame, which by means of a lever is brought to, and removed from the hat block at pleasure.

The hat is placed on the block with a table for the rim, on a vertical rotating shaft. After the hat is placed, the sliding frame is brought forward by means of the lever, bringing all the flats to their relative and proper position, over and against the hat. Then another lever is disengaged from a catch, which permits a weight to act upon a third lever, which in its turn acts upon the vertical shaft surmounted by the hat, and brings the hat in contact with the flats while the shaft revolves, and thus the pressing is performed. After being thus put in motion, no farther attention from the operator is required, until the hat is sufficiently pressed. One man can operate three or four machines at the same time, pressing from twelve to fifteen hundred hats per day, while on the old hand machine one man could ordinarily press but five hundred a day.

This machine, and what the plaintiff contended, were modifications of it, came into general use soon after its construction, and superseded all that had gone before.

The defendants claimed that the modification used by them, was an original invention of one Paul Hildreth, formerly of Petersham, made subsequently to plaintiff's invention and patent.

This was denied by the plaintiff, who insisted that it was taken from his machine, with alterations and modifications, for the purpose of evading the patent; but under the ruling of the Court, it was immaterial, as affecting plaintiff's right of recovery, whether an original invention or otherwise, being subsequent in point of time to plaintiff's invention and patent.

The point most strenuously urged by the defendants, was, that their machine differed substantially from the one patented by plaintiff, and on this point, under the ruling of the Court, the case turned.

The question arose what plaintiff had claimed and patented,—whether a machine *as* a machine, new in its structure as a whole, or merely a new combination of old parts; and if a combination merely, whether a combination effected by *any* mechanism, or a combination effected by *the* means, and operating in the particular manner described in his specification of claim. If the latter, the question of priority of invention was disposed of, for it was not pretended that any prior machine contained the same combination, *constructed* and *operating* in the same way.

But it was contended on the part of defendants, that if this construction were given to the claim, they did not infringe, as some of the elements of combination in their machine were constructed and operated substantially different from corresponding elements in plaintiff's.

On the question of identity of machines, the plaintiff called as experts, Thomas Blanchard and R. H. Eddy, of Boston, and the defendants called Charles M. Keller, of New York city.

SPRAGUE, J., charged the jury, that the plaintiff had claimed and patented a combination, *constructed* and *operating* as described in his specification, and to that he was limited; that to constitute an infringement, the defend-

ants must have used the same combination, constructed and operating substantially in the same way ; that if they had used only two of the three elements of combination, it was not an infringement. Nor was it an infringement, if any one or all their elements of combination were constructed and operated substantially different from plaintiffs.

Yet a mere change in form or proportion, or a substitution of mechanical means or equivalents, in any one or all the elements, producing the same result, would not constitute a substantial difference within the meaning of the patent law. Nor would it be a defence, that they had added to the combination, or any element thereof, and made improvements, provided they used plaintiff's combination, constructed and operating substantially in the same way.

Such additions and improvements, though meritorious, gave them no right to appropriate what belonged to another without making compensation. It was for the jury to say, in view of the evidence, under the instructions of the Court, and from an inspection of the models before them, whether the defendants' machine did in fact contain the combination claimed and patented by plaintiff, constructed and operating substantially in the same way.

The jury returned a verdict for the plaintiff, and assessed damages at \$1110—\$510 of which was for use of machines, and \$600 for counsel fees.

Rufus Choate and H. E. Smith, for plaintiff.

B. R. Curtis and Cyrus Cummings, for defendants.

Supreme Court of Tennessee.

*Reported for the Knoxville Tribune, by O. P. Temple and
R. H. Armstrong, Esqrs.*

BETTIS vs. MANSFIELD.

From the record in this cause it appears that at the April Term, 1847, of the Circuit Court of Jefferson county, a rule was made upon the plaintiff to justify his security, or give other security for the prosecution of the suit, on or before the second day of the next term, or the suit should be dismissed. At the next term, (August, 1847,) the judge failed to attend, and no causes were entered.

At the ensuing December term, on Wednesday, the defendant moved the Court to make the rule absolute, and to dismiss the suit, upon the ground of the failure of the plaintiff to comply therewith, which was done accordingly. Upon said motion being made, but before any action thereon by the Court, the plaintiff offered good and sufficient security in compliance with said rule, but the Court refused it, and made the rule absolute.

The record further shows, that at a previous term, August, 1845, a similar rule was made upon the plaintiff; and in compliance with said rule, six persons became bound for the prosecution of the suit. The rule granted at the April Term, 1847, was upon an affidavit simply stating that two of the six securities were insolvent, without questioning the solvency of the other four.

J. Peck for plaintiff; Arnold and Cocke for defendant.

MCKINNEY, J., delivered the opinion, and held, that the circuit Judge erred,

1. In making a second rule upon the plaintiff to justify or give other security, upon the ground merely that *two* of the former securities were insolvent.

2. In making the rule absolute at a term subsequent to that at which, by the terms of the rule, the party was required to justify or give other security. A specified day of the ensuing term was fixed upon in the rule, for the plaintiff's compliance therewith; and with the expiration of that term the rule spent its force and expired, and could not be continued over by a continuance of the cause. The principle is not affected by the fact, that the rule could not be acted upon at the ensuing term, in consequence of there being no Court; this was no more the fault of one than of the other. It imposes no great hardship upon the party to require him to renew the rule, if not made effectual at the proper time. .

3. Although it has been settled, that the refusal to allow the party to give security *after* the rule has been made absolute and the suit dismissed, though tendered at the same time, will not constitute error for which this Court will reverse, however disinclined to encourage a practice so harsh and stringent; yet, it has never been held, that if such security be tendered *before* the final judgment upon the rule, the Court may refuse it. The exercise of such discretion would be error.

Upon all the foregoing grounds the judgment is erroneous and must be reversed, and the cause *remanded* and *reinstated*.

Important Decision.—The Hagerstown *News* publishes the following abstract of a decision by the Court of Washington county, Md., in the case of *Long vs. Horne*.

" *First*.—The purchaser may be in possession of the news of a rise in prices, and the seller may be ignorant
VOL. VIII.—No. 27.

thereof, yet any contract entered into between them, without any misrepresentation being made to the seller by the purchaser, is a valid contract and binding in every respect. Thus, if the seller ask no questions, the buyer is not bound to impart to him his superior information—and the contract thus made between them is a good one.

Second—If the purchaser be in possession of news, and is questioned with reference thereto by the seller, he is not privileged to deny his possession thereof or misrepresent the same, and, to do so with a view to draw the other into contract adverse to his interests, is a *fraud* which will vitiate the contract and render it of non effect; for the law defines fraud as being the concealment or misrepresentation of a material fact, by which a party is lulled into a false confidence or induced to forego inquiry necessary to the protection of his interests. From this it is not, however, to be inferred that the purchaser, even when questioned, is bound to communicate his information to the seller. He is only required not to conceal the fact of his being “posted,” and not to misrepresent, or be guilty of falsehood with reference to the information he has in his possession.

Supreme Court of Pennsylvania.

AT PHILADELPHIA, MARCH 17, 1823.

Reported for the American Law Journal, by F. C. Brightly, Esq., (author of Brightly on Costs.)

COMMONWEALTH vs. THADDEUS WENTWORTH.

It is a public nuisance, and indictable at common law to place on the foot-way of a public street, a stall for the sale of fruit and confectionary, although the defendant pay rent to the owner of the adjoining premises, for the use of so much of the pavement as is occupied by him.

Certiorari to the Mayor's Court to remove an indict-

ment for nuisance. The indictment set forth that the defendant “on the first day of March, 1822, at the city aforesaid, and within the jurisdiction of this court, with force and arms, &c., in the common and public street there, called Delaware South Third street, unlawfully and injuriously did put and place and cause and procure to be then and there put and placed, a stall for the selling and exposing for sale fruit and confectionary, and the said stall in the said common and public street, on the day and year aforesaid, for the space of six hours, at the city aforesaid, and within the jurisdiction of this court, unlawfully and injuriously did cause to be and remain, whereby the said street and common highway, during the time last aforesaid, was very much obstructed and straitened, so that the good citizens of this Commonwealth could not through the said street and common highway, during the time in that behalf aforesaid, go, return, pass, repass, labor, ride and labor with their horses, carts and carriages as they might, and were wont and accustomed to do, to the great damage, hindrance and common nuisance of all the good citizens of this Commonwealth, going, returning, passing and repassing in, along and through the said public and common street, to the evil example of all others in like case offending, and against the peace and dignity of the Commonwealth of Pennsylvania.”

The case was tried at Nisi Prius on the 20th November, 1822, and the following special verdict found. “The jury find that the said street called Delaware Third street, in the city of Philadelphia, is a common and public street and highway of fifty feet in width. That the defendant on the first day of March, 1822, put and placed on the brick pavement, on the west side of the said public street, between High and Chesnut streets in the said city, a stall three feet in height, three feet in breadth, and eight feet in length, for the selling and exposing to sale of fruit and

confectionary, and caused the said stall to be and remain in the said street as aforesaid, on the day and year aforesaid, for the space of six hours; that the defendant paid to the owner of the house adjoining a certain rent; and that the said stall was not placed on the porch or steps of a house. If, upon these facts, the court should be of opinion that the law is with the Commonwealth, the jury find the defendant guilty; but if the court be of opinion that the law is with the defendant, then they find for the defendant."

March 17, 1823, judgment for the Commonwealth, and the Court order and adjudge that the defendant pay a fine of one dollar and the costs of prosecution.

LAWS OF PENNSYLVANIA.

We copy from a law enacted at the recent Session of the Legislature of Pennsylvania the following sections in reference to Promissory Notes and counterfeit endorsements:—

SEC. 7. That from and after the passage of this act, in all cases where suit is brought in any of the Courts of this Commonwealth, upon or for the recovery of the amount due on any promissory note, post note, note of hand, due bill, bill of exchange, draft, order, check, or other instrument of writing in the nature thereof, no plea shall be held to be available, and no defence shall be made or taken by the defendant or defendants for want of proper and timely demand of payment or acceptance, or proper and timely protest for and notice of non-acceptance or non-payment of the same, unless the respective places where such demand is to be made, and where such notice

is to be served or given, or the names and residences or place of business of the respective parties thereto, shall be legibly and distinctly set forth thereon.

SEC. 8. That when such places of demand and notice, for such names, residences, or places of business are omitted to be set forth as aforesaid, demand of acceptance, as well as protest for and notice of non-acceptance, may be made and given at any time before maturity of such instruments as require acceptance and demand of payment, as well as protest for and notice of non-payment of the same at any time after maturity thereof and before suit is brought thereon.

SEC. 9. That in all such cases of omission as aforesaid, promissory notes, post notes, notes of hand, due bills, and such like instruments, shall be held to be payable and protestable at the place where they are dated, and if they contain no place of date, then at the place where they are deposited or held for collection, and bills of exchange, drafts, orders, checks, or other instruments or securities in the nature thereof, shall be held to be acceptable, payable and protestable at the place where the same shall or may be addressed to the drawer or drawers.

SEC. 10. That whenever any value or amount shall be received as a consideration in the sale, assignment, transfer, or negotiation, or in payment of any bill of exchange, draft, check, order, promissory note, or other instrument negotiable within this Commonwealth, by the holder thereof, from the endorsee or endorsees, or payer or payers of the same, and the signature or signatures of any person or persons represented to be parties thereto, whether as drawer, acceptor, or endorser, shall have been forged thereon, and such value or amount, by reason thereof, erroneously given or paid, such endorsee or endorsees, as well as payer or payers respectively, shall be legally entitled to recover back from the person or per-

sons previously holding or negotiating the same, the value or amount so as aforesaid given or paid by such endorsee or endorsees, or payer or payers, respectively, to such person or persons, together with lawful interest thereon, from the time that demand shall have been made for repayment of the same.

SEC. 11. That all bills of exchange, drafts, orders, checks, promissory notes, or other instruments in the form, nature, or similitude thereof, that shall or may hereafter be made, or be drawn, or endorsed to order within this Commonwealth, upon any person or persons, body politic or corporate, co-partnership, firm or institution of, or in or that shall be made payable in any other State, Territory, Country, or place whatsoever, for any sums or sum of money, with the current rate of exchange in Philadelphia, or such other place within this Commonwealth where the same may bear date, or in current funds or such like qualification superadded, shall be held to be negotiable by endorsement, and recoverable by the endorsee or endorsees in his, her, or their own name or names in the same manner, to all intents and purposes, as bills of exchange and promissory notes formally drawn and ordinarily in use and negotiable within this Commonwealth, are now by law recoverable therein.

Approved—April fifth, one thousand eight hundred and forty-nine.

THE COMMONWEALTH *vs.* JOHN EICHAR.

In 10th Judicial District of Pennsylvania—Westmoreland County—at August Sessions, 1848.

1. A female who has been seduced, and, after the birth of a child, married and deserted by her seducer, is not a competent witness against him on an indictment for seduction under the Pennsylvania statute of 1843.

2. Such a marriage, although after seduction, and followed by immediate desertion by the husband, is a defence against an indictment for seduction under the act of 1843.

This was an indictment for seduction under the act of 1843.

The Commonwealth offered the female alleged to have been seduced, as a witness to prove seduction, &c. The defence objected and proved a marriage between the defendant and the person offered as a witness, subsequent to the alleged offence. On his cross-examination, the clergyman who performed the marriage ceremony stated that the defendant left the house where the marriage took place soon after the ceremony, and the father of the female testified that his consent to the marriage was obtained after the commencement of the prosecution, and through the representations of defendant, that he "would act in good faith and do what was right;" and further, that the defendant had not lived or co-habited with his wife since the marriage.

Upon this state of facts it was contended by defendant's counsel that the evidence of the wife was inadmissible under the general rule, which excludes a wife from testifying against her husband.

Kuhns, for Commonwealth, argued :—

That the female, notwithstanding her marriage with the defendant, was a competent witness to prove the seduction, it being a personal injury, from the necessity of

the case, upon common law principles, and cited 6 Binnely 286, 3 Chit. C. L. 818, (note 250,) 1 Leach 500, 1 Vent. Rep. 243, 2 Yeates 114, Purd. Dig. 1062.

Cowan & Foster, for defence :—

1. The wife is incompetent. The exceptions to the general rule are confined strictly to cases where the offence consisted in violence to the person of the wife, as in *Bently v. Cooke*, 3 Doug. 422, 1 East P. C. 454, 2 Hawk. P. C. c. 46, sec. 77, Lord Audley's case, 3 How. St. Tr. 402, Lady Lawley's case, Bul. N. P. 287, Whit-house's case, 2 Russel, 606.

2. There is no offence under the circumstances of this case. The Legislature intended to punish illicit connexion procured by a *false* promise—not where the promise is fulfilled. The crime in the Legislative mind was the procurement of such connexion by fraud, artifice and deception—without intent to fulfil the promise. There must be a design to succeed by falsehood. When the promise is performed it shows there was no fraud or falsehood—and according to all analogy, it would seem that if the seducer offers to perform his promise of marriage, and the female refuses, no indictment could be sustained. The mischief under the old law was not seduction followed by marriage—nobody complained of this but rather rejoiced so bad a business was so well mended. The evil was the refusal of the seducer to marry the female,—that is the *gist* of the offence—it is that which the Legislature intended to punish.

3. The evidence is insufficient. Without the testimony of the female it cannot be known that the promise of marriage was the effective inducement.

Burrell, for the Prosecution :—

1. The wife is competent on several grounds—she is so *ex necessitate*. She is so because the facts to be proved occurred before the marriage, and marital confidence has

never actually subsisted between these parties. The case is not within the reason of the rule, nor the scope of the legal policy which exclude a wife. 6 East 192, 13 Peters 221, 8 Watts 257, 7 Verm. Rep. 506. She is competent under the count for F. & B. at least. 2 Stark. Ev. 552-3 and notes. The marriage was fraudulently procured to close the wife's mouth—this should be left to the jury, 2 Yeates 114. She was competent before, and cannot be rendered otherwise by the fraud or trick of the defendant. 2 Stark. Ev. 552 in note, Wakefield's case, 1 East P. C. 454.

2. The fact of marriage is not material to the issue—it disproves none of the allegata in the indictment. If admitted, however, the prosecution should be allowed to shew either force, or fraud and desertion.

3. The marriage is no matter of defence, or ground of acquittal known to the law. Before the act of 1843, seduction was a private—fornication the public wrong—and if there was a marriage promise its breach was also a private injury. These private wrongs remain as before, and the plain intent of the Legislature was to make fornication, when accomplished by means of a marriage promise, more highly penal. If reparation of the private injury, by marriage, satisfies also the public wrong, a recovery of damages in a civil suit for breach of promise, being satisfaction in the eye of the law, should have the same effect. The private wrong may be repaired, but the public wrong—the crime—remains. The offence of seduction was complete before the marriage, and no act of the parties could extinguish it. The penalty can only be escaped by pardon—a power vested in the Executive, but which the theory of the defence gives to the injured individual.

The evidence was rejected by the Court, whereupon the Commonwealth proved the admissions of defendant that he was the father of the child, and that it had been

begotten under promise of marriage. It also appeared that the defendant had been in the habit of visiting the girl for three or four years previous to birth of the child—the child was born before the marriage.

Upon behalf of the defence the marriage was given in evidence to the jury under objection from Commonwealth's counsel. No other evidence was offered by defendant.

The Commonwealth then offered the same proof as to the marriage and subsequent desertion, which had been given to the Court on the question of the reception of the wife's evidence. This was objected to by defence and objection sustained.

After argument by Messrs. Kuhns and Burrell, for Commonwealth, and Messrs. Foster and Cowan, for Defence—the Court, KNOX, President Judge, charged the jury in substance, as follows :

That the view which the Court took of the legal effect of the marriage, would render unnecessary a critical examination of the several requisites of the statute under which the indictment was framed.

The evidence fully establishes the fact that six months previous to the finding of this indictment by the Grand Jury, the defendant was legally married by the Rev. Mr. Rugan, of the Lutheran Church, to the female whom he is charged with having seduced. She is by the laws of God and Man his wife, and as such is entitled to all the rights which are incident to that relation. Can he now be convicted and punished for her seduction before marriage? It is not the carnal connexion even when induced by the solicitation of the man that is the object of this statutory penalty, but it is the *seduction under promise of marriage* which is an offence of so grievous a nature as to require this exemplary punishment. What promise? One that is kept and performed? Clearly not, but a false promise broken and violated after performing its fiendish pur-

pose. The evil which led to the enactment was not that females were seduced and then made the wives of the seducer, but that after the ends of the seducer were accomplished his victim was abandoned to her disgrace. An objection to this construction is that it places within the power of the seducer a means of escaping the penalty.—So be it. This is far better than by a contrary construction to remove the inducement to a faithful adherence to the promise which obtained the consent. The jury were therefore instructed that in the opinion of the Court the marriage afforded a defence to the counts for seduction, but that in order to provide for the maintenance of the child, (which was born before wedlock,) there might be a conviction, if they were satisfied of defendant's guilt upon the count for fornication and bastardy.

The jury found the defendant guilty of fornication and bastardy, but not guilty of seduction, and he was sentenced accordingly.

Kentucky Court of Appeals.

GAINES vs. GAINES.

1. A legislative divorce, being an exercise of judicial power prohibited by the Constitution of Kentucky, is inoperative, as it respects the rights of property involved, and cannot deprive the wife of her interest in the estate of her husband, as it would have existed had there been no divorce.

2. How far such an act operates upon the social relations of the parties *quere?*

The following case was reported by Thomas B. Stevenson, Esq., for the Western Law Journal of May, 1849:

The Court of Appeals delivered an opinion in this case at its last term. The record presented the question of

the power of the Legislature to grant divorces, and its effect on the rights of property of the parties. The following brief statement of the leading facts is deemed necessary for a proper understanding of the opinion of the Court on the principal question. In 1832, Thos. Gaines, being then about 70 years old, married Catharine L. Pentecost, who was about 30 years old, and who had never been married. They lived very unhappily together, until 1837, when a separation took place under an arrangement by which the husband transferred to trustees, for the benefit of his wife, some personal property and debts on other persons, amounting to \$700 or \$800. In 1842, Mrs. Gaines filed her bill in chancery against her husband, praying for alimony. He filed an answer resisting her claim on various grounds. At May term, 1843, he filed a supplemental answer, in which he relied on an act of the Legislature divorcing him from his wife. The act was passed March 10, 1843, and is in these words :

“Be it enacted by the General Assembly of the Commonwealth of Kentucky, that Thomas Gaines of Green county, be divorced from his wife, Catharine Gaines.”

In January, 1844, Thomas Gaines died, and in June 1844, a bill of revivor was filed by Mrs. G. against his representatives, claiming dower in his lands, and a widow's distributive share in his slaves and personalty ; and, also a large sum for arrearages of alimony. These claims were resisted by the representatives of Thomas Gaines.— In 1847, the cause having been previously submitted, by consent, to the decision of a member of the bar, in consequence of the refusal of the Judge to adjudicate in the case, a decree was rendered disallowing the bar as set up under the legislative divorce, on the ground that the act was unconstitutional, and rejecting the claim for arrearages of alimony, and for a distributive portion of the slaves and personalty, but decreeing to the widow dower

in the lands, slaves, and personalty ; together with rents for the lands and hire of the slaves. The representatives of Gaines appealed : and Mrs. Gaines assigned cross errors, insisting, (1) she was entitled to dower in the lands sold by her husband before marriage, and conveyed by him during coverture, in pursuance of his parol contract ; (2) dower in the slaves given by the husband to his children during coverture ; and (3) for arrearages of alimony. These questions were decided against Mrs. Gaines on the authority of various cases referred to in the opinion.

The Court then proceeded to the main question in the case : whether the legislative act of divorce bars the widow's right of dower in the estate of her late husband.

On that question, the Court (CHIEF JUSTICE MARSHALL delivering the opinion,) says :

We therefore proceed to a consideration of the question how far her rights, as they would have existed upon the death of her former husband, had there been no divorce, have been affected by the legislative act relied on to bar or destroy them. The case not having been brought on to a hearing before the death of Thomas Gaines—an omission which, as there was nothing done towards its preparation after the filing of his supplemental answer in May, 1843, may probably be ascribed to the impression produced by the divorce—the question is not directly presented as to the effect which the divorcing act should have had upon the claim of alimony, if the cause had come on to a hearing before that claim had abated by the death of the husband. But it is certain, that the act, if effectual to terminate for all purposes, and in every respect, the relation and incidents growing out of the marriage, and the rights consequent upon it, must have operated at least so far as to have deprived the wife of all claim to future support from her husband, and perhaps of all claim to remuneration for past neglect and suffer-

ing; and if it be thus effectual, we cannot but remark it as a singular feature in the case, and one which we must suppose to be an anomaly in a constitutional government in which the departments of power are not only carefully distinguished and divided, but the depositories of power in each department are prohibited from exercising, except in cases expressly authorized, any power properly belonging to the others. Can it be consistent with this division and prohibition, that after one department, erected for the very purpose of ascertaining and enforcing existing rights according to existing laws, had obtained possession of the case and jurisdiction over the parties and their rights, by a suit regularly before it in a form and for purposes authorized by law, another department, not entrusted with the jurisdiction of deciding upon individual rights, as founded in existing laws, prohibited from exercising judicial power, except in a few instances not embracing this; prohibited from passing any law impairing contracts or their obligation; prohibited from taking private property for public use, and having no pretext of a right to take it from A and give it to B—may, upon the application of one of the parties, take the case from the appointed and selected forum, and by its mere *fact* put an end not only to the contest as existing in the judicial tribunal, but to the right itself, for the enforcement of which the party alleging injury had appealed to the tribunal appointed by the Constitution and the law for the ascertainment of private rights and the redress of private wrongs? If the Legislature could thus draw to itself by its own will, the jurisdiction of rights actually in litigation before the proper tribunal, and either by its own judgment upon the merits decide conclusively against the right asserted, or by its own will, independently of the merits, absolutely and conclusively destroy it, the right thus to interfere with and control the regular administra-

tion of the law in the appointed tribunals, implies a power over the law and its administration, which, if it find no obstruction to its exercise in the existence of a right under and by the law and in the authorized appeal to the tribunals of the law for its ascertainment and enforcement would find no greater obstacle in a decree or judgment by which it was already ascertained and attempted to be enforced. If the legislative divorce, obtained during the pendency of the suit for the alimony, was a termination of the right and a bar to its further assertion in that suit, so if it had been obtained after a decree for the payment of an annual sum as alimony so long as the parties should be separated, it would have been equally a termination of the right to any future payment, and a bar to the further execution of the decree. And it seems clear to us, that if the Legislature could not, by its direct action or determination upon the rights of the parties, divest the court, which had rendered a decree, of its power, to enforce the right adjudged according to the laws from which it was derived, no more can it, by such action or determination, deprive the Court, having lawful possession of the case and jurisdiction to ascertain and enforce the right, of its lawful power to ascertain and enforce it according to the laws by which it was created and sustained.

It is the province of the Legislature (so far as individual rights are concerned,) to pass laws as a rule of action and of right for the community at large, or for particular classes; or for individuals under certain circumstances, to be defined by law. It is the province of the judicial power to administer these laws by applying them to the facts in individual cases for the ascertainment of the rights and the redress or repression of the wrong. It is essential to the stability and security of individual rights, that they should be determined by *pre-existing* laws under which they have originated, and by *general laws* operating upon simi-

lar rights, and not by laws made merely for their decision when they come to be contested. It is to avoid the danger of individual rights being determined, not by *pre-existing* laws, but by a law *first* promulged *in the decision itself*, or *made for it*, or *by the secret law of will or discretion* that the judicial department, entrusted with the power of ascertaining and enforcing private rights, as created and sustained by law, is prohibited from exercising legislative power; and it is for the same reason that the legislative department, entrusted with the power of making, altering, and repealing laws, is prohibited from the exercise of the judicial power, which is but the power of applying the existing laws to the facts, and thence deducing and establishing the rights in contest. But it is in vain that the Constitution has vested this power exclusively in the judiciary department, and said that it shall not be exercised by the legislative, if, when a party, alleging injury by the deprivation of a right, has resorted, by the appropriate remedy, to the appropriate tribunal for redress, the party accused of wrong may, by an appeal to the Legislature, obtain the passage of an act, not to change the general laws by which all similar cases are to be governed, nor to change the organization or jurisdiction of the Courts by which others, as well as himself, may be effected, but an act for his own exclusive benefit, to operate only between himself and his antagonist, and by extinguishing the right asserted against him, to stifle judicial enquiry, arrest the administration of the law in his case, and save him from those consequences to which the general laws would subject him, if he has committed an injury to the rights of another.

The right of dower and distribution, it is true, was not expressly in litigation in the suit. But as the husband, in answer to the claim of alimony, alleged causes for divorce according to the existing law, and prayed for it, and as

the wife answered, resisting the prayer, the question of his right to a divorce was directly in litigation, and the wife's contingent right of dower, &c., (as well as her right to alimony,) so far as it was dependent upon there being a divorce or not, was involved in the issue, and to defeat both of these rights was no doubt the object of the prayer for a divorce. But not only must the husband have failed in obtaining a divorce upon his cross-bill on the ground of abandonment, since the separation, having been at least consented to, if not compelled by him, was no abandonment—and no other sufficient causes were alleged—but if he had succeeded, though the right to alimony and dower might, under those names have ceased, the Court which decreed the divorce would have had a discretionary power to make equitable provision for the wife out of his estate. Stat. Law, 123. Then the appeal to the Legislature was not only from a litigation regularly commenced by the wife in assertion of her right to alimony, but also from a litigation regularly instituted by the husband himself, in assertion of his right to a divorce, which, if successful, would defeat the pending claim to alimony, and the contingent right of dower, &c., which might otherwise become absolute, but would still leave his estate subject at once to a permanent provision for the wife.

Why, then, did he appeal to the Legislature? Not for the mere purpose of being relieved from the society of his wife, or of terminating her right to his society. For they had already been separated, by mutual consent, for five years, without any indication of a probable desire for a re-union, and no decree of the Court could have compelled it. Did he seek a legislative divorce, in order that he might be at liberty to contract again, and for the fourth time, the relation of marriage? His great age, being then about 84 years old, forbids the supposition that the di-

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force was either sought, or would have been granted, on any such ground. But as he had already passed, by a considerable interval, the ordinary limit of human life, as he must have known that his end was approaching near, and that, in all probability, his wife would survive him by many years; as he must have found reason in the progress of the suit between them, to apprehend that the agreement made upon the separation might not be effectual to extinguish or bar her rights, as against his estate, and had probably become aware of the Chancellor's power over it, even if a divorce were granted; and as the terms of the agreement referred to, and the nature and extent of the provision made by it, (exceeding but little the small amount of the debts due to the wife at her marriage) showed a determination, evinced also by his giving away his property even before the separation, that his wife should have no right or share in his estate, the fair inference is, that he abandoned the forum which he himself had selected for the trial of his right to a divorce, and appealed to the legislature for the sole purpose of taking his estate out of the grasp of the Chancellor, in which he had voluntarily placed it, and of extinguishing by a legislative divorce, the rights of his wife in his property, which would not have been extinguished, but might have been established by a judicial divorce; and it may be fairly assumed, that he resorted to this appeal as a means of effecting this purpose, either because a legislative divorce might be obtained speedily, and before his death, or because, apprehending that he could make out no ground for a divorce according to the existing laws, by which the judicial tribunal was bound, he sought to effect his purpose by carrying his case to that department which, having power to make the law, was not bound by pre-existing laws, but, might, as he supposed, decide it according to the *unpromulged law of its will or discretion*;

or, in other words, might decide it by the *mere declaration that he be divorced from his wife*. It is indeed apparent, that the real matter in dispute, from beginning to end, in the suit for alimony, and in the suit and other proceedings for a divorce, was, whether the wife should have an interest in the husband's estate.

The question, as thus developed by an analysis of the case, is not simply whether the legislature may, under any circumstances, constitutionally enact that A be divorced from B, but whether, when it is manifest that a party, after having sought a divorce in a judicial tribunal, and while his suit is there pending, abandons that forum and resorts to the legislative power, for the sole purpose of affecting and defeating the legal and equitable rights of his wife in his property, the divorce granted on such application can, without disregarding the division of powers and distinction of departments as established by the Constitution, and the security of private rights of contract and of property therein guaranteed, be considered as affecting, to any extent, the rights of property involved in the question of divorce. We are of opinion that it cannot.

An act simply enacting that A be divorced from B, though passed by the legislative department in the ordinary form of a law, falls short of the ordinary definition of *law*, and more nearly resembles a sentence, which whether founded on a previous investigation of facts under existing laws, or on the mere will or discretion of the legislature, is in the nature of a decree of rescision or dissolution, and if effectual, executes itself by its own terms. It was said by this Court, in the case of *McGuire vs. McGuire*, 7 Dana, 184, that "so far as the dissolution of a marriage may be for the public good, it may be the exercise of a legislative function; but so far as it may be for the benefit of one of the parties, in consequence of a

breach of contract by the other, it is undoubtedly judicial. And when thus altogether judicial, it may be beyond the authority of the Kentucky legislature, which under our State Constitution cannot exercise any power clearly and purely judicial." And in the subsequent case of *Barthelmy vs. Johnson*, 3 B. Monroe, 91, the opinion is indicated in emphatic terms, that in hearing and deciding upon evidence, that alleged causes of divorce by breaches of the marriage contract existed, and in founding thereon a legislative divorce, the legislature would be violating the constitutional inhibition against their exercise of judicial power. In the case of the *State vs. Fry*, 4 Missouri Reports, the Supreme Court of Missouri decided, after a laborious investigation of principles and authority, that a legislative divorce was unconstitutional, on the ground, it would seem, that if founded upon the causes defined by previous laws conferring on the courts authority to grant divorces for such causes, it was clearly the exercise of judicial power prohibited by the Constitution, and that if founded on causes not thus defined, it was, if not in that case also, the exercise of judicial power, a retrospective law, and as such, prohibited by the Constitution of that State. It would seem, however, that if founded upon alleged breaches of the marriage contract, deemed by the legislature sufficient ground of divorce in the particular case, though not so declared by previous laws, it would still be the exercise of power in its nature judicial, since it would be a decision upon the law of the contract as applied to the facts of the case. And if there be, besides, a combination of the legislative power, the act is not the less within the principle or the letter of the prohibition, that neither of the three departments shall exercise any power properly belonging to the other; nor can the legislature, by withholding from the judiciary the means or right of exercising power properly judicial, invest itself

with the right of exercising that power. It would seem too, that a legislative divorce can be regarded as an exercise of the purely legislative function, only, if at all, when it is founded upon the mere will or discretion of the legislature, without reference to the breach of any existing contract or law. In such a case, however, the act, though purely legislative, would be retrospective, so far as it might operate to determine mere existing rights. And although no express prohibition against the enactment of retrospective laws is found in the Constitution of Kentucky, yet it does prohibit the exercise of judicial power by the legislature, and the passage of laws impairing contracts, and the taking of private property for public use, without just compensation. Which last interdiction must include the taking of the property of A and giving it to B, by legislative act; since there could be no plausible pretext for such an act, unless the idea that the public good required the transfer would afford one.

Then, so far as a legislative divorce is founded upon breaches of the marriage contract, whether they might or might not, by previous laws, be proper ground for a judicial divorce, affecting the rights of property in the delinquent party, it is the exercise of judicial power prohibited to the legislature; and if, so far as it is not founded upon such causes, it be the exercise of purely legislative power, it is subject to the restriction against the taking private property for public use, and cannot operate to take the property of one person and give it to another without making compensation, because this too is prohibited. And it would be vain to say that the legislature cannot take the property of A and give it to B, if upon the petition of the latter, it may annul the title of A derived from B, with the effect of restoring B to his title without incumbrance. The power of prescribing by general laws what causes shall constitute sufficient ground

for a divorce, and what shall be the consequences of a divorce founded on the ascertainment of these causes, is strictly within the legislative competency, and its exercise is entrusted to the legislative discretion. But the power of deciding upon the existence of these causes in individual cases, and of pronouncing the divorce and enforcing its legal consequences, is strictly judicial. And if it be conceded, as intimated in *McGuire vs. McGuire, supra*, that the marriage contract is not, as a contract, wholly removed like other private contracts, from the power of the Legislature to dissolve it in any particular case by special act of divorce, and that the dissolution of a marriage, if required by the public good, may be a legislative function, still it cannot be admitted that a power thus deduced, uncertain upon principles as to its existence, and still more uncertain as to the grounds of its legitimate exercise, can override the express and highly conservative prohibitions in the Constitution, intended for the protection of private rights of property. We are of opinion, therefore, that whatever power, to be exercised in view of the public good, the legislature may have to enact divorces in special cases, as it cannot, even for the public good, change the right of private property from one to another without compensation, much less can it do so by a special act of divorce, sought by one of the parties against the consent of the other, with the purpose or effect of operating upon the rights of property incident to the marriage relation as created and sustained by the general laws applicable to that relation; and the wife, having taken no advantage of any privilege afforded by the divorce, she is in no manner precluded from contesting its operation. The fact, that before the passage of the act of divorce in this particular case, the parties themselves had placed the question of divorce, and the rights involved in it, under the jurisdiction of a Court, to be decided

by the existing laws, if it does not affect the case in principle, serves at least, to make the conflict of powers and the bearing of the Constitution upon it, more palpable than it might otherwise be.

Under these views, and without deciding upon the effect of legislative divorces, so far as they may operate upon the personal relations, and abilities or disabilities of the parties, we conclude, that the divorce, in this case, is inoperative as it respects the rights of property involved, and cannot deprive the wife of her interest in the estate of her husband, as it would have existed had there been no divorce ; and we only remark further, that, although the repeated and unquestioned exercise of a power which operates upon the community at large, or on considerable masses, should form a strong, if not an irresistible proof of its legitimate existence, the same consideration cannot be given to the repeated exercise of a power which exhausts its force in determining the condition or rights of two individuals, without any effect upon the rights or interests of the mass of citizens. And, as from the nature of the thing, it is not to be expected that acts of such limited operation, will attract, to any great extent, the serious attention or consideration of the legislative bodies, their enactment cannot be regarded as a serious and deliberate assertion of the power involved, made upon such reflection and investigation as should give it a decisive influence.

Judge Simpson, though not present at the preparation and delivery of this opinion, was in consultation on the case, and concurred in the conclusion ; wherefore, the decree is affirmed.

Supreme Court of Penn'a.--Eastern District--Phil'a.

Reported for the American Law Journal by R. C. M'Murtrie, Esq.

ABSTRACTS OF DECISIONS.

APRIL 7, 1849.

The Court refused to quash an appeal from the *Nisi Prius* for want of a certificate signed by the judge who tried the cause—the proceedings in other respects being regular. *Erb v. Scott*.

APRIL 11.

A. claiming title entered upon land the owners of which were beyond seas, and held adverse possession until 1828. B. purchased a distinct title and entered. Held that as possession was not adverse to the absent owners until the act of 1815, and as it ceased before the expiration of the fifteen years allowed by that statute, his title was not perfected; and B. not claiming A's title could not tack his subsequent possession to that of A. so as to complete the period required by the statute as a bar. *Moore v. Collishaw*.

A tenant in common mortgaged the whole estate and remained in actual possession. If the intention was not to hold adversely to her co-tenant, the mortgage does not operate as a constructive ouster, and there being evidence that her intention was not to oust her co-tenant, whether there was a constructive ouster was for the jury. *Ib. Per Bell, J.*

APRIL 16.

A. in his last sickness called B. to him and declared his wishes as to the disposition of his estate, and directed B. to write it down as his will and called upon two persons to bear witness that that was his will. B. made a pencil memorandum of A's intention and A. died in one hour afterwards, but continued sensible to the last. Held, there was no proof of a nuncupative will. *Porter's Appeal*.

APRIL 17.

Devise in a will before the act of 1833 of a plantation "to my wife for life, and at her decease to descend on my three daughters, or the survivors of them in joint stock, share and share alike—the personalty to descend to my three daughters in the same manner and on the same principle as my real estate." Held, to pass the fee to such of the daughters as survived the testator: there being also a devise without words of limi-

tation of a part of the land to be sold, the proceeds to be distributed.—*Johnson v. Butler.*

Testator devised lands to his wife for life and at her death to his daughter in fee, subject to the payment of a legacy to his grandson, which he directed should be paid by his daughter in one year after the death of his wife. The legacy is vested in interest immediately, but the enjoyment is postponed until the period indicated in the will. *Maxwell v. McClintock.*

The Orphans' Court need not refer a matter to an auditor, when the facts are such that they are able to determine them on the pleadings and depositions. *Ib.*

APRIL 19.

A settlement of an administration account in which the administrator claims credit for a certain sum retained for the use of A, one of the distributees of an estate of which his intestate was administrator, is some evidence that A was then living, to rebut the presumption of her death arising from her absence for seven years unheard from. *Keech v. Rinehart.*

So of the Sheriff's return to proceedings in partition in the Orphans' Court by a co-heir of A, who was there named as one of the heirs, certifying that the parties were severally warned. *Ib.*

A stranger cannot appeal from a decree of the Register granting letters of administration of the estate of one who has been dead more than twenty-one years. And an administrator holding funds admitted to be due to such decedent is a stranger. *Beeder's estate in re.*

APRIL 23.

A husband who has received a large estate from his wife and made no settlement on her, and has left her residence, taking with him his furniture and making no provision for her maintenance, is not entitled to receive the interest of a fund bequeathed in trust for her which accrued before the desertion, where it was proved that he had previously treated her with cruelty; and his subsequent requests to her to come and live with him are immaterial. *Tyson's Appeal.*

Bequest of the interest of a fund to be held in trust for A. wife of B. to be paid to her during life, remainder to her children, creates a separate use in A. *Ib.* Per Coulter, J.

An engine house partly of stone and partly of wood, with the stone foundations for a steam engine erected by a tenant for years, for the use of a coal mine, he having the privilege of removing all fixtures at the expiration of his term, is not the subject of a mechanic's lien. *White's Appeal.*

A. being the holder of B's notes drawn for value, deposited them with a bank as collateral security for discounts made and to be made for A.—

B. then delivered duplicate accommodation notes, to A. who agreed to take up the original notes when B. paid the accommodation notes. B. having notice of the deposit, paid the accommodation notes—but the original notes remained with the bank which after they matured made a discount for A. without notice of the arrangement between A. and B.—The bank is entitled to receive on the notes the amount of the last discount made after their maturity. *Spering's Appeal*.

A collateral agreement between the covenantor and covenantee in a ground rent deed is no defence to an action of covenant for arrears brought by the assignee of the rent without notice. *Patterson v. Juvenal*.

APRIL 24.

A purchaser who has received his deed and given a mortgage for the purchase money, may deduct therefrom incumbrances known to him at the time he made the contract. *Wolbert v. Lucas*.

APRIL 27.

Where a sale by sample was made of tobacco which was stated in the bill of parcels to be superior sweet scented Kentucky leaf tobacco, such a statement affords no evidence from which a jury may infer a warranty that it was either superior or sweet scented. And the seller is not liable in an action ex-contractu if it was Kentucky leaf tobacco, though of a very low quality, ill flavored, unfit for the market and not sweet scented. *Fraley v. Bispham*.

A letter from the vendee to the vendor avering that goods had been bought under a guaranty that the vendor would reimburse the vendee any loss that might be sustained, together with an enclosed account showing the extent of the loss, not replied to—are no evidence on a count upon an account stated.

APRIL 28.

After an acquittal upon indictment the judge may upon the evidence presented on the trial require the defendants to find sureties for the peace and good behaviour; and commit them until compliance with the order. *Bamber v. The Comth.*

A sale under a testamentary power for the payment of unscheduled debts discharges the land from the statutory lien of testator's debts. *Cadbury v. Dural*.

And an executor may purchase from the trustees at such sale. *Ib.*

A. devised the residue of his real estate to B. his wife for life, who was also executrix, and to trustees subject to the life estate in trust to sell and pay debts not otherwise provided for. The trustees conveyed to B. under the power for a consideration mentioned in the deed but not in fact paid. B. mortgaged the land and it was sold by the Sheriff under the mortgage. The mortgage has priority in the distribution over creditors of the testator who have obtained judgment within five years from his death.

MAY 3.

Where a grantor executes and acknowledges a deed before a magistrate, which has been left there for that purpose by the agent of the grantor and grantee, and leaves the instrument with the magistrate without instructions, the delivery is absolute. And instructions given the next day to the agent not to deliver the deed until payment of the purchase money, are immaterial and do not amount to a delivery in escrow—for matters subsequent to an unqualified delivery to a stranger, cannot make a delivery in escrow. *Blight v. Schneck.*

And where a *bona fide* purchaser from the grantee, who obtained such a deed without performing the condition, has intervened, the *onus* of showing that there was no absolute delivery is on the grantor. *Ib.*

A deed delivered to an agent as an escrow and by him delivered to the grantee passes a title voidable only. *Ib.*

An assignee for creditors may convey by attorney, though there be no special authority given in the assignment to delegate his power. *Ib.*

HARRISBURG, MAY 24, 1849.

Where, in an action for conspiracy to defame, one count was defective, and the other two valid, and the evidence was all applicable to the two valid counts, although part of it was also applicable to the defective count, it was not error in the Court below to permit the verdict after the lapse of a term from its rendition, to be entered on the valid counts, and to strike out the defective count. *Martin v. Haldeman, et al.*

A release, *not under seal*, purporting to discharge one of two sureties in a bond upon receiving his proportion of the debt, does not discharge the other surety, notwithstanding the case of *Milliken v. Brown*, 1 Rawle 391. *Shock v. Hertz's Adm'rs.*

Where, after levy on a store of goods, one of the plaintiffs in the execution, in company with his attorney, directed the Sheriff to permit the goods to remain in the custody of Ziegler, one of the partners in the store, who was authorized to continue selling the goods as usual out of the store, but was required to pay the proceeds to the Sheriff, who assented to the arrangement upon condition that the plaintiffs should take the responsibility, and that the arrangement should terminate whenever any other creditors issued execution :—it was held that this arrangement postponed the execution in favor of writs subsequently issued and proceeded on according to law. *Per COULTER, J. Bingham & Brothers v. Young & Cassel.*

A release executed to render a man a competent witness cannot be impeached on the ground of fraud, by means of proof that such witness obtained the release by representations of facts alleged to be within his knowledge, which he knew at the time to be false, although he afterwards testified to their truth. *Grosh v. Bradley.*

A By-Law of a beneficial Society which declares that "if any member shall enlist as a soldier in the Army of the United States, he shall lose his membership" does not operate upon the case of a member who united himself to a volunteer company organized under State laws, and afterwards marched with such company to Mexico under the call made by the President for 50,000 volunteers in pursuance of the act of Congress of 1846. *Com'th. ex rel. John Axer v. Franklin Beneficial Association.*

NEW PUBLICATIONS.

In the arrangement of matter for this number of the Journal, the notices of New Publications were all unavoidably omitted. We hope to have room for them in the next number. Among the publications referred to are the following valuable works:—

State Trials of the United States during the administrations of Washington and Adams. By Francis Wharton. Published by Carey & Hart 126 Chesnut street, Philadelphia.

Cruise's Digest of the Law of Real Property, with additions and notes for the American Student, by Professor Greenleaf. Published by Little & Brown, Boston.

Angell's Law of Carriers of Goods and Passengers by land and water. Published by Little & Brown, Boston.

Public Laws of the United States, for 1848-1849—edited by George Minot. Published by Little & Brown, Boston.

The Law of Patents for useful inventions in the United States. By George Ticknor Curtis. Published by Little & Brown, Boston.

In Chancery of New Jersey.

ZACCHEUS B. COOK, *Complainant*, and ELDAD COOK, CHAS. B. FITHIAN and PHILIP FITHIAN, *Ex'rs of Joel Fithian, Defendants.*

1. A joint settlement in the Orphans' Court will bind both Executors in Equity.

2. How far one Executor is liable for the acts of his Co-Executor.

WILLIAMSON, C. Eldad Cook, sr., by his will dated the 8th of April, 1809, ordered and directed that a certain part of his real estate should be sold at the discretion of his Executors, and the money arising from the sale be equally divided between his wife, his three daughters and the complainant. Also, that his moveable property should be sold and the money divided between the same persons, after his just debts and funeral charges were

paid. He further directed that after one year from his decease, all the money arising from the sales, which should be coming to the complainant, should be put to interest, except what would be sufficient to teach him to read, write and cypher, as far as through practice, &c.

The testator died soon after making his will, and his executors, Eldad Cook, jr., and Joel Fithian proved the same, and in August following made sale of the lands ordered to be sold. They afterwards settled their accounts in the Orphans' Court of the county of Cumberland, and in the Term of November, 1811, by the sentence or decree of that court on the final settlement and allowance of their accounts, there was a balance found in their hands to be disposed of, as the will directs, of \$2,278 43.

Eldad Cook, jr., was considered in good circumstances until about November 1816, when several judgments were entered up against him, and he is now considered insolvent. Joel Fithian, his co-executor, in the spring of 1816, was afflicted with the palsy, and from that time attended but little to business. He died in November, 1821.

The complainant at the time of the death of the testator, was an infant and did not arrive at full age till Nov. 1821, and he has brought the bill against Eldad Cook, jr., and the executors of Joel Fithian, dec'd., for payment of the amount of his legacy. The other legatees have all been paid their respective portions of the balance so found by the settlement in the Orphans' Court, to be in the hands of the executors.

It is not pretended that any part of the money arising from the sales has been put at interest by the executors according to the directions of the will, and the only question raised and discussed at the hearing was, whether the complainant can resort for payment to the assets of Joel Fithian, as it appears from the facts of the case, as agreed upon by the respective solicitors, that no part of the as-

sets of Eldad Cook, dec'd, remained in the hands of Joel Fithian, at the time of his death ; but, that all moneys which had been received by him, had either been duly applied in the course of administration, or had been paid over by him to Eldad Cook, jr., who had been the principal acting executor.

The first point necessary to be considered in deciding this case is, as to the effect of the sentence or decree of the Orphans' Court. In my opinion that decree is conclusive, and establishes the joint liability of the two executors for the balance then found in their hands ; and that it is not competent for the executors of Joel Fithian, in this suit, to go into evidence to prove, what part of the proceeds of the sales went into the hands of Eldad Cook, jr., and what part thereof into the hands of Fithian ; and that no part of the assets was in the hands of Fithian at the time of that settlement and decree. It was not legally necessary for the two executors to have accounted jointly, and to charge themselves jointly with the balance of the estate which remained unadministered : And if they were not both liable for that balance, they should have accounted either separately or have distinguished in their accounts the receipts and disbursements of each one, and in whose hands the balance then was. But instead of doing so, they accounted jointly for the assets and the commissions for their services have been allowed to them jointly—and they have therefore, by their mode of accounting, admitted their joint liability for the balance, and charged themselves with it, and the decree has determined and fixed that liability, so that the same cannot be questioned so long as that decree remains unimpeached.

It was ingeniously contended by the counsel for the executors of Fithian, that the decree is only conclusive as between the executors and the estate, and not as between the executors themselves ; nor as between them and

creditors or legatees. But the language of the act is decisive against this distinction, for it expressly declares that the sentence or decree of the Orphans' Court, on the final settlement and allowance of the accounts, "shall be conclusive upon all parties, and shall exonerate and forever discharge every such executor, guardian or trustee, from all demands of *creditors, legatees* or others, beyond the amount of such settlement "except as there provided for." And the very object of the settlement in the Orphans' Court is to ascertain the amount in the hands of the accountants, and for which they are answerable to those who are justly entitled to it, and who may file exceptions to the accounts, and come in and be heard, either before the court or before auditors, and who therefore are properly concluded by the settlement. And I cannot conceive how the settlement can be conclusive as to the amount, without also being conclusive as to the persons in whose hands that amount is declared to be. For, if each executor might, after such settlement, as between him and those interested in the estate, controvert the extent of his own liability, and endeavor to throw the whole responsibility upon his co-executor; a different result might, and probably would very frequently occur, from that of the settlement in the Orphans' Court, upon the final settlement of the accounts. And if, instead of accounting jointly, executors should account separately, as they may do if the settlement is not conclusive, as to the extent of each one's liability to creditors, legatees or those interested in the estate, the settlement would not amount to anything—for no person would be bound by it, even as to the amount of the balance unadministered and remaining to be distributed among those entitled to it.—The settlement in the Orphans' Court is considered by the act, a final one, and to make it so, it must be conclusive, not only as to the amount, but as to the liability for

that amount. And in case of intestacy the Orphans' Court is authorized to order distribution among the next of kin to the intestate ; and the persons entitled to such distribution may have their remedy at law in case of non-payment against the executors or administrators so accounting, which proves in my opinion most satisfactorily, that the decree must be final and conclusive between the executors and those interested in the estate, not only as to the amount, but as to the executor or executors who is or are liable therefor.

This point being settled, I do not find any circumstances in the case, that have since occurred, which can exonerate the assets of Fithian. His having paid over in his life time to his co-executor, the several sums of money which he received, arising from the sales of the land, cannot have the effect. Where one executor received the money of the estate of his own authority and his co-executor is merely passive, and does not contribute by his own acts to enable him to receive it—the one who receives it is only answerable for it. But it has been long and firmly settled, that if one executor, without a sufficient excuse, pays over money, or does any other act, by which money belonging to the estate gets into the hands of another executor, they are both answerable for it, 7 Vesey 186, 9 Vesey 103, 11 Vesey 333–7, 7 East 206, 5 John C. R. 294, 2 Vernon 570, 1 Dickens 356, 2 Brown 114–18, and the motive being innocent is no excuse, 11 Vesey 335.

The question then is, whether the executors of Fithian have assigned a sufficient excuse to justify him in having paid over the money to Cook. The equity relied upon is, that after Cook received the money of Fithian he paid over a much larger sum than what he had received, in payment of debts and legacies. And it was urged that if the money was properly applied by Cook, it is the same

as if it had been properly applied by Fithian, and the case of Lord Shipbrook *vs.* Lord Hinchbrook (4 Vesey 254, 16 Vesey 476) was relied upon. In that case Lord Eldon was of the opinion, that if an executor, having got funds into his hands, which he ought to have applied to the payment of debts, but had not done so, and was in such circumstances that he had not funds to discharge the debts, he ought to pay, in respect of what he had so received; and his co-executor placed in his hands other funds, liable for debts, for the *purpose of discharging those debts*, and which were *actually so applied*; that in that case, the co-executor would not be liable, merely upon the ground that he had, not in conjunction with him, received other money which he had not applied but wasted. To bring a case within the principle there laid down by Lord Eldon, the money must be paid over for the *express purpose of being applied* according to the directions of the will, or in payment of debts: and in a way the executor paying it over would himself be justified in applying it—and if it cannot be ascertained that it was so *applied*, the executor paying it over is chargeable with the loss. The doctrine of Lord Eldon when so limited and understood, appears to be founded in the strongest principles of reason and equity—for the whole assets are liable for the payment of the debts—and if one executor has wasted those which were in his hands, that is no reason his co-executor should not apply the assets which he is possession of in the discharge of the debts—and it is his duty so to apply them. And whether he so applies them himself or does it through the medium of his co-executor, can make no difference in reason or equity. And the same doctrine was so applied by the Master of the Rolls in *Underwood vs. Stevens*, 1 Merivale 712.

Therefore admitting the proposition to be perfectly
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correct, "that if the money was properly applied by Cook it is the same thing as if it had been properly applied by Fithian;" yet the executors of Fithian are not entitled to the benefit of that principle, for it does not appear that the money was paid by Fithian to Cook, for any purpose connected with the will—or that it has been properly applied. Evidence, not that Cook wanted the money for payment of debts and legacies, or that he so applied it; but only, that he afterwards paid debts and legacies to a greater amount than the money so received by him, is not sufficient to protect the assets of Fithian from the loss—for it neither proves that the money was paid over by Fithian for a purpose connected with a due execution of his duty: nor that it was so actually applied by Cook. In the case before, of *Lord Shipbrook vs. Lord Hinchbrook*, the three executors who controverted their liability alleged that they joined in executing the power of attorney to the fourth executor, for the sale of the stock, upon his *request and representation*, that it was required for the purpose of paying debts—and Lord Eldon directed an enquiry whether the *specific money* received by the co-executor was applied in the discharge of any and what debts.

The present is simply the case of an executor, without any excuse, delivering over money to his co-executor to do just what he pleases with it: and the executor to whom it is delivered over, afterwards becomes insolvent and the money is thereby lost. Under which circumstances, according to all authorities, the executor paying it over, or in case of his death, his assets must make it good.

In fact both executors appear to have been culpably negligent, and to have made themselves liable not only for the principal, but for the interest of it also. The complainant was quite young at the time of his father's death, and it was the intention of his father, that this legacy

should accumulate during the complainant's minority.—The will, therefore, expressly directs that the money, except what was necessary for the purposes then expressed, should after one year be put to interest. This direction has been totally and shamefully neglected, and there is no evidence that Fithian ever even enquired of Cook what he had done with the money, or in any way concerned himself about the execution of this trust, although the settlement of the Orphans' Court was in 1811. No person is obliged to accept the office of executor, but if he does accept it, he is bound by every moral and legal obligation faithfully to discharge the duties of it. He is not at liberty to act or not act when he pleases. He is not at liberty to sell and then omit to place the money at interest as directed by the testator—and to relieve himself from all further trouble and responsibility by paying over the money in his hands to his co-executor to do what he pleases with it. Such a doctrine would be ruinous, particularly to infants. The very object of appointing several executors is, to have their joint caution, diligence and responsibility in the management of the estate. And if executors are not to be held answerable for such gross palpable negligence and breach of duty as has occurred in this case, I do not know that executors can in any case be charged for neglect of duty.

I shall, therefore, decree that both executors have made themselves liable for the amount due to complainant, according to the settlement in the Orphans' Court, together with interest, after making to the executors all just allowance—and that it be referred to a master to take the account, &c.

The Chancellor said the decree being personal against the executors would be with costs.

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